No. 95-974-CFX Title: Arizonans for Official English and Robert D. Park, Petitioners
v.
Arizona, et al.

Docketed:
December 21, 1995 Court: United States Court of Appeals for the Ninth Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Dec 20 1995 | Petition for writ of certiorari filed. (Response due January 29, 1996) |
| | Jan 10 1996 | Waiver of right of respondent Arizona to respond filed. |
| | Jan 18 1996 | Order extending time to file response to petition until January 29, 1996. |
| | Jan 18 1996 | This extension is granted for all respondents. |
| | Jan 22 1996 | Brief amici curiae of Washington Legal Foundation, et al. filed. |
| | Jan 22 1996 | Motion of Equal Opportunity Foundation for leave to file a brief as amicus curiae filed. |
| | Jan 22 1996 | Brief amici curiae of FLA-187 Committee, et al. filed. |
| | Jan 22 1996 | Brief amicus curiae of U.S. English, Inc. filed. |
| | Jan 22 1996 | Brief amicus curiae of Arizona Legislators filed. |
| | Jan 22 1996 | Brief amicus curiae of U.S., Inc. filed. |
| | Jan 22 1996 | Motion of U.S. English, Inc. for leave to file a brief as amicus curiae filed. |
| | Jan 29 1996 | Brief of respondent Maria-Kelly Yniguez in opposition filed. |
| | Jan 29 1996 | Brief amicus curiae of Pacific Legal Foundation filed. |
| | Jan 29 1996 | Brief of respondents Arizonans Against Constitutional Tampering & Thomas Espinosa in opposition filed. |
| | Feb 8 1996 | Reply brief of petitioners filed. |
| | Feb 14 1996 | DISTRIBUTED. March 1, 1996 |
| | Mar 11 1996 | REDISTRIBUTED. March 15, 1996 |
| | Mar 18 1996 | REDISTRIBUTED. March 22, 1996 |
| | Mar 25 1996 | Motion of Equal Opportunity Foundation for leave to file a brief as amicus curiae GRANTED. |
| | Mar 25 1996 | Motion of U.S. English, Inc. for leave to file a brief as amicus curiae GRANTED. |
| | Mar 25 1996 | Petition GRANTED. In addition to the questions presented by the petition, the parties are requested to brief and argue the following questions: (1) Do petitioners have standing to maintain this action? (2) Is there a case or controversy with respect to respondent Yniguez? SET FOR ARGUMENT December 4, 1996. ********** |
| | Apr 29 1996 | Order extending time to file brief of petitioner on the merits until May 24, 1996. |
| | May 8 1996 | Brief amicus curiae of Pacific Legal Foundation filed. |
| | May 9 1996 | Joint appendix filed. |
| | May 22 1996 | Brief of petitioners Arizonans for Official English and Robert D. Park filed. |
| | May 23 1996 | Brief amici curiae of FLA-187 Committee, et al. filed. |
| | May 23 1996 | Motion of U.S. English, Inc. for leave to file a brief as amicus curiae filed. |
| | May 24 1996 | Brief amicus curiae of Thurston Greene filed. |

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| Entry | Date | Proceedings and Orders |
|---|---|---|
| | May 24 1996 | Brief amici curiae of Washington Legal Foundation, et al. filed. |
| | Jun 6 1996 | Order extending time to file brief of respondent on the merits until July 12, 1996. |
| | Jun 10 1996 | Motion of U.S. English, Inc. for leave to file a brief as amicus curiae GRANTED. |
| | Jun 10 1996 | Motion of respondent Maria-Kelly Yniguez for divided argument filed. |
| | Jun 17 1996 | Opposition of respondent Arizona to motion of respondent Maria-Kelly Yniguez for divided argument filed. |
| | Jun 26 1996 | Order further extending time to file brief of respondent on the merits until July 26, 1996. |
| | Jul 1 1996 | Brief of respondents Arizona, et al. filed. |
| | Jul 12 1996 | Brief amicus curiae of Human Rights Watch filed. |
| | Jul 23 1996 | Brief amici curiae of Linguistic Society of America, et al. filed. |
| | Jul 25 1996 | Brief amici curiae of Nydia M. Valazquez, et al. filed. |
| | Jul 25 1996 | Brief amicus curiae of New Mexico filed. |
| | Jul 25 1996 | Brief amici curiae of Puerto Rican Legal Defense And Education Fund, et al. filed. |
| | Jul 26 1996 | Brief amicus curiae of United States filed. |
| | Jul 26 1996 | Brief amici curiae of National Council of La Raza, Ayuda, Inc., et al. filed. |
| | Jul 26 1996 | LODGING consisting of ten copies of documents submitted by council for amici National Council of La Raza, et al. |
| | Jul 26 1996 | Brief of respondent Maria-Kelly Yniguez filed. |
| | Jul 26 1996 | Brief amicus curiae of Navajo Nation filed. |
| | Jul 26 1996 | Brief amici curiae of American Civil Liberties Union, et al. filed. |
| | Jul 26 1996 | Brief amici curiae of Mexican American Legal Defense and Educational Fund, et al. filed. |
| | Jul 26 1996 | Brief of respondents Arizonans Against Constitutional Tampering & Thomas Espinosa filed. |
| | Jul 26 1996 | Brief amici curiae of Hawaii Civil Rights Commission, et al. filed. |
| | Aug 6 1996 | Motion of respondent Arizona for divided argument filed. |
| | Aug 13 1996 | Opposition of petitioners to motion of respondent Arizona for divided argument filed. |
| | Aug 19 1996 | Opposition of respondent Maria Kelly F. Yniguez to motion of respondent Arizona for divided argument filed. |
| | Aug 26 1996 | Record filed. |
| | Aug 27 1996 | Reply brief of petitioners Arizonans for Official English and Robert Park filed. |
| | Aug 27 1996 | Reply brief of respondents Arizona, et al. in opposition to the judgement filed. |
| | Sep 5 1996 | Record filed. |
| | Sep 20 1996 | Motion of respondent Maria-Kelly Yniguez for divided argument DENIED. |
| | Sep 20 1996 | Motion of respondent Arizona for divided argument DENIED. |
| | Oct 18 1996 | CIRCULATED. |

No. 95-974-CFX

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Dec 2 1996 | Supplemental brief of petitioner filed. |
| | Dec 2 1996 | LODGING consisting of 20 copies of Ninth Circuit decision in Tucker v. California submitted by counsel for petitioner and distributed. |
| | Dec 4 1996 | ARGUED. |

Supreme Court, U.S.
FILED

95-974 DEC 20 1995

No. OFFICE OF THE CLERK

# In The
# Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelley F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Petition for a Writ Of Certiorari to the United States Court of Appeals for The Ninth Circuit

## PETITION FOR WRIT OF CERTIORARI

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December 20, 1995

148P

## QUESTIONS PRESENTED

Article XXVIII of the Arizona Constitution declares English the official language of the State and requires governmental actions to be taken in English. A State employee sought to write government documents in Spanish. A 6-5 majority of the U.S. Court of Appeals for the Ninth Circuit, *en banc*, declared Article XXVIII unconstitutional because it violated the free speech rights of public employees.

1) Whether a State constitutional provision declaring English the official language of the State and requiring English to be used to perform official acts violates the Free Speech Clause of the First Amendment.

2) If not, whether a government employee has a Free Speech right to disregard the official language of her employer and choose the language in which to perform official actions.

**Rule 14.1 Listing:**

**Petitioners and Respondents:**

Arizonans for Official English

Robert D. Park

State of Arizona

Maria-Kelley Yniguez

Jaime P. Gutierrez

Arizonans Against Constitutional Tampering

**Others Listed Below:**

Rose Mofford, Governor of Arizona

Robert Corbin, Attorney General of Arizona

Catharine Eden

**Rule 29.1 Statement**

Arizonans for Official English is an unincorporated association and has no parents or subsidiaries.



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Petitioners, Arizonans for Official English and Robert D. Park, pray that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit, *en banc*, in *Yniguez v. Arizonans for Official English*, entered on October 5, 1995.

## OPINIONS BELOW

The majority opinion, concurrences and dissents of the United States Court of Appeals for the Ninth Circuit, *en banc*, are printed in the Appendix hereto ("App."), 1a, *infra*, and are to be reported at 69 F.3d 920. The substantially-identical original panel decision of the United States Court of Appeals for the Ninth Circuit on the merits was withdrawn when the matter was certified for *en banc* review. 53 F.3d 1084 (9th Cir. 1995); App. 4a. The original decision is reported at 42 F.3d 1217 (9th Cir. 1994).

A panel decision of the United States Court of Appeals for the Ninth Circuit denying a suggestion of mootness is printed at App. 93a, *infra*, and is reported at 975 F.2d 646 (9th Cir. 1992). The decision of the United States District Court for the District of Arizona on the merits is printed at App. 97a, *infra*, and is reported at 730 F. Supp. 309 (D. Ariz. 1989).

A panel decision of the United States Court of Appeals for the Ninth Circuit permitting Petitioner to intervene is reported at 939 F.2d 727 (9th Cir. 1991). A decision of the United States District court for the District of Arizona denying petitioners' Motion to Intervene is reported at 130 F.R.D. 410 (D. Ariz. 1990).

## JURISDICTION

The judgment of the Ninth Circuit, *en banc*, declaring Article XXVIII of the Arizona Constitution unconstitutional, was entered on October 5, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

Article XXVIII of the Arizona Constitution:

ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE

**1. English as the Official Language; Applicability.**

Section 1.(1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3) (a) This Article applies to: (i) the legislative, executive and judicial branches of government, (ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities, (iii) all statutes, ordinances, rules, orders, programs and policies, (iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This state and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.



**2. Requiring This State to Preserve, Protect and Enhance English.**

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the state of Arizona.

**3. Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.**

Section 3.(1) Except as provided in Subsection (2): (a) This State and all political subdivisions of this State shall act in English and no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances: (a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as a part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

**4. Enforcement; Standing.**

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

U.S. Constitution, Amendment I (in part):

Congress shall make no law . . . abridging the freedom of speech. . . ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment XIV, Section 1 (in part):

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.



## STATEMENT OF THE CASE

This is a First Amendment case, decided by a 6-5 *en banc* majority, which asks whether a State's declaration of English as the official language for government actions violates the First Amendment. This case arises because the Arizona Constitution requires official acts to be performed in English. A government employee, seeking the right to execute government documents in a language her supervisor did not understand, challenged the English language requirement under the First Amendment and federal civil rights laws. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1343, and 2201.

This is also a "government speech" case, which asks whether government's own speech rights, protected in *Rosenberger v. Rector and Visitors of Univ. Of Va.* ("*Rosenberger*"), __ U.S. __, 115 S. Ct. 2510 (1995) and *Rust v. Sullivan* ("*Rust*"), 500 U.S. 173 (1991), are limited by the speech rights of government employees, protected under *United States v. National Treasury Employees Union* ("*NTEU*"), __ U.S. __, 115 S.Ct. 1003 (1995) and similar cases.

**The Challenge to the Arizona Constitution:**

Article XXVIII of the Arizona Constitution ("Art. XXVIII") provides, *inter alia*, that English is the official language of Arizona and that government actions shall be taken in English.

In 1988, Respondent Maria-Kelley F. Yniguez ("Yniguez"), a first-year law student, was employed by the state to evaluate medical malpractice claims filed against it. Reporter's Transcript ("RT"), February 13, 1989, Pages 52-53. She had authority to settle claims up to

$10,000. *Id.*, Page 53. Her supervisor could not read Spanish. *Id.*, Page 71-72.

As part of the settlement process, Yniguez would draft claim release settlement forms. *Id.*, Page 54. Each settlement document was different. *Id.*, Page 69. Yniguez testified that some of those settlement forms were drafted in Spanish without English translations. *Id.*, Pages 55, 68. Yniguez admitted that, if she drafted settlement documents in Spanish, her supervisor would not be able to read them. *Id.*, Page 72.

Yniguez said she used Spanish in her job, *inter alia*, because "It's kind of a solidarity thing", RT, Feb. 13, 1989, Page 57, and so she can express some elements of malpractice claims in Spanish which are impossible to express in English. Stipulation of Facts (Court Docket Record ("CR") Doc. 62), Page 5. Some of the persons to whom she speaks Spanish are attorneys. *Id.*, Page 4.

It is not clear what elements of medical malpractice claims Yniguez cannot express in English. App. 84a (Wallace, C.J., dissenting). Yniguez said that inexpressible concepts include her cultural heritage as a Hispanic, the sense of community and experiences shared by Hispanics, "and other feelings." Plaintiff's Statement of Facts (CR Doc. 17), ¶ 9. She also noted that she speaks Spanish on the job "to demonstrate my belief that Arizona enjoys a pluralistic society." Affidavit of Maria-Kelly Yniguez, *attached* to CR Doc. 17, ¶ 6.

Immediately following the enactment of Article XXVIII, Yniguez ceased speaking Spanish in the workplace. RT, Feb. 13, 1989, Page 58. She filed suit pursuant to 42 U.S.C. § 1983, claiming the constitutional amendment infringed her rights under the First and Fourteenth Amendments, and violated federal civil rights laws.



Yniguez testified that she filed the lawsuit so she could draw up claim release forms in Spanish for Spanish-speaking claimants. RT, April 27, 1989, Page 10. She claimed that she had a First Amendment right to communicate and draw up claim release forms in Spanish for Spanish-speaking claimants. *Id.*, Page 11.

The State defendants, relying on an Arizona Attorney General's opinion, Ariz. Atty. Gen. Op. I89-009, responded that the amendment was constitutional because it applied only to governmental sovereign acts. App. 109a; 730 F. Supp. at 314, 315-16. The State also argued that it was immune from suit under the Eleventh Amendment. App. 99a; 730 F. Supp. at 311.

**The District Court Decision:**

The District Court agreed with Yniguez's constitutional analysis, holding Article XXVIII unconstitutional on its face under the First Amendment. App. 112a-13a; 730 F. Supp. at 317. The District Court used a "facial overbreadth" analysis, finding that the violation of the First Amendment was substantial, and that there were no conceivable limiting interpretations. App. 109a-10a; 730 F. Supp. at 313-14.

The crux of the District Court's holding was its belief that:

> When read at its full literal breadth, Article XXVIII would force Arizona governmental officers and employees **whose use of a non-English language in the performance of their official duties is protected by the First Amendment, . . . to either** violate their sworn oaths to obey the state constitution, and thereby subject themselves to potential sanctions and private suits, or to curtail **their** free speech rights.

App. 107a; 730 F. Supp. at 314 (emphasis added).

Despite this broad language, however, the District Court later announced that "I don't know of any place in this Court's opinion that said that anyone could use any language that he or she chose in the performance of their jobs." RT, March 26, 1990, page 33.

The Court did not find that Yniguez's own constitutional rights were abridged. App. 106a; 730 F.Supp. at 314. It did find "that Article XXVIII is so broad as to inhibit the constitutionally protected speech of third parties." *Id.* The District Court also did not issue an injunction, finding that the record showed no substantial threat of irreparable injury to any person. App. 111a-112a; 730 F. Supp. at 317.

**Preliminary Appellate Matters:**

Petitioner Arizonans for Official English ("AOE") filed a Motion to Intervene and a notice of appeal within a week of the District Court's original decision on the merits. Although the District Court denied intervention, 130 F.R.D. 410 (D. Ariz. 1990), a Ninth Circuit panel allowed AOE to intervene. 939 F.2d 727, 740 (9th Cir. 1991).[1]

After the state noted that Yniguez ceased to be a state employee in April 1990, the Ninth Circuit panel rejected a

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1 The panel also permitted Arizonans Against Constitutional Tampering ("ACT") to appear during oral argument and later to intervene. App. 10a. ACT unsuccessfully challenged Art. XXVIII in state court. *Ruiz v. Arizona*, No. CV-92-19603 (Sup. Ct. Maricopa County, January 26, 1994)("This Court concludes that Article XXVIII is content-neutral, and therefore does not violate the First Amendment"), *reprinted in* ACT's amicus curiae brief before the Ninth Circuit, Tab 10. ACT's first appeal request to the Arizona appeals court was denied. *Ruiz v. Arizona*, No. 1 CA-SA 94-0137 (Ariz. Court of Appeals, Division One, June 1, 1994).



suggestion of mootness, holding that Yniguez could appeal the denial of nominal damages. 975 F.2d 646, 647 (9th Cir. 1992). AOE timely filed a second precautionary notice of appeal. App. 10a, n. 8.

The Ninth Circuit panel struck down Article XXVIII as "facially overbroad" and held that it "violates the First Amendment . . . in its entirety." 42 F.3d 1217, 1243 (9th Cir. 1995). AOE's timely Petition for Rehearing and Suggestion of Rehearing *En Banc* was granted. 53 F.3d 1084-85 (9th Cir. 1995). The panel decision was withdrawn. App. 4a.

**The 6-5 *En Banc* Decision:**

On October 5, 1995, the Ninth Circuit, *en banc*, ruled 6-5 that Article XXVIII was unconstitutional under the First Amendment. App. 60a. Judge Reinhardt wrote the majority opinion. The *en banc* majority opinion was substantially identical to the withdrawn panel opinion. App. 4a.

The majority held that the Arizona Attorney General's interpretation was not justified by the text of Art. XXVIII, App. 17a, and that abstention was not proper where an Arizona court has already reviewed Art. XXVIII "and has done nothing to narrow it." App. 19a-20a. The majority also held that facial overbreadth analysis was proper because "The speech rights of all of Arizona's state and local employees, officials, and officers are thus adversely affected in a potentially unconstitutional manner by the breadth of Article XXVIII's ban on non-English **governmental speech**." App. 23a (emphasis added). The majority then held that choice of language was speech, App. 27a-31a, and that the requirement that official acts be performed in English was "invidious, discriminatory, or, at the very least, wholly insufficient" to support a restriction on speech. App. 34a.

Then the majority turned to the free speech rights of government employees and found that "[h]ere the speech does not fit easily into any of the categories previously established." App. 38a. For the majority "it is enough to note that the fact that speech occurs as a part of the performance of the employee's job functions affects the nature of our analysis but does not necessarily determine its outcome." App. 40a.

The majority was concerned that Article XXVIII "significantly interferes with the ability of the non-English-speaking populace of Arizona 'to receive information and ideas.'", *quoting, Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976). App. 43a. The speech in question (choice of language) "is unquestionably of public import" because "[i]t pertains to the provision of governmental services and information." App. 41a.

The majority completed its analysis by finding that there were no state interests supported by Article XXVIII, App. 45a-56a, and that "the adverse impact of Article XXVIII's overbreadth is especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Hispanics and other national origin minorities." App. 56a. "The Arizona restriction on language provides no encouragement [to learn English], however, only compulsion; as such, it is unconstitutional." App. 59a.

The majority dealt with the dissents' government speech analyses in a footnote. App. 40a-41a, n. 24. The footnote first found *Rosenberger* and *Rust* "simply irrelevant here" because the majority thought the cases dealt only with "power to regulate government-subsidized speech of **private parties**." App. 40a (emphasis added). Then the footnote said that the power to regulate government speech is not "unlimited." *Id.*



The majority also "disapproved" *Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978), which said that choice of language in government is a political question. App. 54a, n. 31.

Judge Brunnetti concurred to emphasize "that the Article's unconstitutional effect on Arizona's elected officials would alone be sufficient reason to strike the provision down." App. 62a.

Judge Reinhardt wrote a special concurrence with his own majority opinion to respond to Judge Kozinski's dissent. "The end result of Judge Kozinski's legal approach would be to punish people who are not as fortunate or as well educated as he – people who are neither able to write for nor read the Wall Street Journal, and indeed would have little cause to do either." App. 69a.

**The Dissents:**

Judge Fernandez wrote the principal dissent, finding that Article XXVIII did not violate the First Amendment. Judge Fernandez found this case at the confluence of three "lines of argument":

> employee speech can be regulated;
>
> the state has a right to control the content and mode of its own speech; and
>
> the general public does not have a constitutional right to have the State provide services in any particular language. App. 81a.

Judge Fernandez cited *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)("The power of the State to . . . make reasonable regulations for all schools, *including a requirement that they shall give instructions in English*, is not questioned.")(emphasis by Judge Fernandez), and *Guadalupe Organization*, 587 F.2d at 1027 ("Whatever may be the consequences, good or bad, of many tongues

and cultures coexisting within a single nation-state, . . . [their validity] cannot be determined by reference to the Constitution. . . . Such matters are for the people to decide."). App. 83a. As Judge Fernandez put it: "Certainly, if the State can require teaching in a particular language. it can itself choose to use a particular language to express the content of what it has to say." App. 79a.

Citing *Rosenberger*, Judge Fernandez wrote: "It is well settled that the State has the right to control what it is paying for; it can control what is said by those acting on its behalf." App. 77a. Judge Fernandez listed other opinions (including one by Judge Reinhardt) in which employers were able to control the languages used by employees. App. 78a.

Judge Fernandez also said that choice of language is a "mode of expression," like "sound trucks and fighting words," which can be regulated. *R.A.V. v. City of St. Paul*, __ U.S. __, 112 S.Ct. 2538, 2545 (1992)("[e]ach . . . is a 'mode of speech'. . .; both can be used to convey an idea, but neither has, in and of itself, a claim upon the First Amendment"). Judge Fernandez found no protection for choice of language either as a mode of expression or for its content. App. 79-80a. "The language does not, in the sense used here, change the content at all." App. 75a.

Chief Judge Wallace joined in Judge Fernandez's dissent, but wrote separately to note that "mere regulation of government employees' mode of speech does not implicate the First Amendment or require the various balancing tests which the majority employs." App. 83a. Chief Judge Wallace also said that "[c]ontrary to precedent, the majority rules that if members of the public would like to receive public employees' speech in a certain way, that desire constitutes a matter of public concern." App. 85a.

Judge Kozinski also dissented separately, finding that the majority opinion had created a new right for govern-



ment employees to "force their employer into federal court and make it prove, to the exacting standard of the First Amendment, that its interest in enforcing its laws outweighs their right not to make statements they find objectionable." App. 86a.

Judge Kozinski continued: "The fault [with the majority theory] lies in the rule's central premise – the dangerous notion that government employees have a personal stake in the words they utter when they speak for the government. The force of this idea will turn government employment into a platform for endless attacks on government policy and governance into a tug of war between those who make the laws and those who enforce them." App. 89a.

Judge Kozinski also noted that "there's nothing unusual about Yniguez's situation, nothing unusual about her claim. The same sort of challenge could be raised by just about every disgruntled government employee." App. 87a.

Judge Kozinski offered several hypothetical examples of government employees who might disagree with their employers' positions. App. 87a-88a. Judge Kozinski predicted that "when confronted with what will come to be known as an Yniguez challenge, states, cities, counties, even the federal government, will have to prove that their laws are worth the candle; **courts will routinely make judgments traditionally reserved for the legislatures and the people themselves**." App. 89a (emphasis added).

Since the State was refused participation as a party, App. 9a; 939 F.2d at 740, AOE filed this Petition to ask the Court to resolve these conflicts.

## REASONS FOR GRANTING THE WRIT

### I. A State's Official Language Does Not Offend the First Amendment.

#### A. The Majority Opinion Below Conflicts With Decisions Permitting Regulation of Choice of Language in Government and Employment.

##### *1. Official Language Efforts Are Common.*

Twenty-one states have enacted legislation declaring English their official language.[2] Several bills pending in the United States Congress would declare English the official language of the United States. *See, e.g.*, H.R. 123, 104th Cong., 1st Sess. (1995) (Cong. Emerson and 191 co-sponsors as of December 5, 1995); S. 356, 104th Cong., 1st Sess. (1995)(Sen. Shelby and 21 co-sponsors as of December 5, 1995). This question has similarly found its way into current political discourse, "The English-Only Debate: Where the Candidates Stand", USAToday, October 18, 1995, 11A, col. 1.

The United States Senate, in its reports on the 1986 immigration reform bill, noted its interest in this issue:

> Furthermore, if **language** and cultural **separatism** rise above a certain level, the unity and political stability of the nation will — in time — be seriously diminished. Pluralism within a united American nation has been the single greatest strength of this country. This unity comes

---

2 In addition to those listed in the majority opinion below, three states adopted official English statutes in 1995: MONT. CODE ANN. § 1-1-510 (1995); 1995 N.H. Laws 157; S.D. CODIFIED LAWS ANN. §§ 1-27-20 to 1-27-26 (1995).



> from a **common language** and a core public culture of certain shared values, beliefs, and customs which make us distinctly Americans.

S. Rep. No. 132, 99th Cong., 1st Sess. 7; S. Rep. No. 62, 98th Cong. 1st Sess. 7 (same)(emphasis added).

The majority below relied on this Court's decision in *Meyer v. Nebraska*, 262 U.S. 390 (1923) to challenge those efforts. App. 3a. "We note, once again, a strong similarity between this case and *Meyer*." App. 58a, n. 33.

Yet *Meyer* is not hostile to the idea of English as the official language. In *Meyer*, for example, this Court said that "[t]he power of the State to . . . make reasonable requirements for all schools, including a requirement that they shall give instructions in English, is not questioned." 262 U.S. at 402. Judge Fernandez, in dissent, offered the quotation above from *Meyer* to demonstrate that "it can hardly be doubted that the State can even choose to foster a particular language to some extent." App. 78-79a.

##### *2) Other Courts Have Found No Constitutional Right to Government Services In Languages Other Than English.*

Unlike the majority opinion below, other courts have found no constitutional right to government services in languages other than English. *See, e.g., Guadalupe Organization*, 587 F.2d at 1027 ("whether the children of this Nation are taught in one tongue and about primarily one culture or in many tongues and about many cultures cannot be determined by reference to the Constitution"); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973)(no right to unemployment notices in Spanish); *Toure v. United States*, 24 F.3d 444 (2nd Cir. 1994)(no right to administrative notices in French); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2nd Cir. 1983), *cert. denied*, 466 U.S. 929

(1984)(same); *Frontera v. Sindell*, 522 F.2d 1215, 1220 (6th Cir. 1975)(no right to civil service exams in other languages); *Vialez v. New York City Housing Auth.*, 783 F. Supp. 109 (S.D.N.Y. 1991)(no right to housing notices in other languages); *United States v. Ramos Colon*, 415 F. Supp. 459 (D.P.R. 1976)(three-judge court)(denial of challenge to English requirement for jurors).

*3) Other Courts Have Not Permitted Employees to Force Personal Choice of Language on An Employer.*

Unlike the majority opinion below, other courts of appeals have found that an employee has no constitutional or statutory right to force language choice on an employer. *See, e.g., Garcia v. Spun Steak Co.* ("*Spun Steak*"), 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 2726 (1994)(EEOC rules against English-on-the-job policies struck down as *ultra vires*); *Jurado v. Eleven-Fifty Corp.* ("*Jurado*"), 813 F.2d 1406 (9th Cir. 1987)(employer could require radio announcer to use English"); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)(employer could require use of English by bilingual employee); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)(employer could require use of English by non-English-speaking employee).

The majority opinion below directly conflicts with these cases. The majority cites *Jurado*, for example, to say that a private employer can fire an employee "who insists on speaking in Spanish", App. 47a, but under the majority's decision below, a government employer cannot, at least not without a First Amendment review.



*4) The Courts Need Guidance on These Conflicts.*

Including this case, the Ninth Circuit alone has reviewed this issue four times in the last eight years. *E.g.: Jurado*, 813 F.2d 1406; *Gutierrez v. Municipal Court of the Southeast Judicial Dist.*, 838 F.2d 1031, 1043 (9th Cir. 1988), *vacated*,[3] 490 U.S. 1016 (1989)(English-on-the-job rule for court clerks declared discriminatory; court should hire bilingual supervisors to discipline clerks who use Spanish to utter racial slurs); *id.*, 861 F.2d 1187, 1194 (9th Cir. 1988)(Kozinski, J., dissenting from denial of rehearing *en banc*)(hiring bilingual supervisors instead of African-American ones is a "let them eat cake" approach, which will exacerbate workplace tensions); *Spun Steak*, 998 F.2d 1480; *id.*, 13 F.3d 296 (Reinhardt, J., dissenting from denial of rehearing *en banc*).

B. The Majority Opinion Below Conflicts With Decisions Describing Speech and Expressive Conduct.

This Court has never held that choice of language, independent of any content, is speech. The majority below's finding that choice of language is "speech alone", App. 31a, conflicts with several of this Court's decisions setting the limits of First Amendment protection.

The First Amendment does not protect every action which a person claims is speech. "It is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or

---

3 Judge Reinhardt says this vacated decision is still effective. *Garcia v. Spun Steak Co.*, 13 F.3d 296 (9th Cir. 1994) (Reinhardt, J., dissenting from denial of rehearing *en banc*); App. 42a, n. 25.

meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546 (1983)(upholding restriction on lobbying by charities).

Here, Ms. Yniguez wanted to write her claim release forms in a language her supervisor couldn't understand. As Judge Fernandez and Chief Judge Wallace showed in dissent, there was no content in Yniguez's choice of language. App. 79a-80a, 84a.

Nor was there expressive conduct. This Court recently reiterated that conduct is speech only when –

> 1) "[a]n intent to convey a particularized message was present, and"
>
> 2) "the likelihood was great that the message would be understood by those who viewed it."

*Texas v. Johnson*, 491 U.S. 397, 404 (1989)(flag burning protected by First Amendment), *quoting, Spence v. Washington*, 418 U.S. 405, 410-11 (1974)(attaching peace sign to flag to protest American involvement in Vietnam was protected speech). As Chief Judge Wallace pointed out, there was no showing of message or reception by the majority below. App. 83a-84a.

Nevertheless, the majority below created six new First Amendment doctrines, based solely on Yniguez's "speech," meaning her choice of language on the job:

> Regulation of choice of whether to use English is regulation of content. App. 27a-28a ; *see also*, App. 31a ("the decision to speak in another language is a decision involving speech **alone**" (emphasis added)).



> If a governmental service is once provided in languages other than English and is "normal" and "cost-free," the First Amendment prohibits its withdrawal for "insufficient" reasons. App. 34a.
>
> The provision of governmental information and services is protected speech on matters of "public concern." App. 41a-42a.
>
> Claimants' "right to receive" governmental information enhances the speech rights of government employees. App. 44a.
>
> The effect on absent third parties' First Amendment rights can be assumed without any evidence in the record. App. 55a.
>
> The First Amendment protects against acts which might mask discrimination against national origin groups or "conceal nativist sentiment." App. 57a.

Each of these new doctrines conflicts with other courts' rulings. For example, no court of appeals has ever held that choice of language is protected speech. *See, e.g., Smothers v. Benitez*, 806 F. Supp. 299, 303 (D.P.R. 1992)(after reviewing decisions, finding "there is no clear statutory or constitutional protection" for choice of language). Similarly, prohibiting the withdrawal of government services conflicts with *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196-97 (1989)("Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all"). And the First Amendment, like the Sixth, is not an anti-discrimination device. *Holland v. Illinois*, 493 U.S. 474, 488 (1990)("The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds.").

Article XXVIII does not violate the First Amendment, and the majority opinion below holding otherwise conflicts with decisions of numerous other courts. This Court should review those conflicts.

**II. A State May Require Its Employees to Use Its Official Language.**

A. The Majority Opinion Below Conflicts With and Improperly Limits This Court's Government Speech Protections:

In *Rosenberger* and *Rust*, this Court held that government may "regulate the content of what is or is not expressed **when it is the speaker** or when it enlists private entities to convey its own message." *Rosenberger*, __ U.S. at __, 115 S. Ct. at 2518-19 (emphasis added). The *en banc* majority agreed: "In many instances, the governmental interest in regulation will be at its height" when government regulates "speech that occurs as part of an employee's official duties." App. 39a.

Yet the majority below limited this Court's government speech holdings to cases where the government hires private parties to speak for it.[4] App. 40a, n. 24. "In both cases, the Court granted the government broad, but not unlimited, power to regulate government-subsidized speech of **private parties**." *Id.* (emphasis added). The majority would not apply the government speech cases to public employee speech: "Neither *Rosenberger* nor *Rust* concerned the authority of the state to penalize the speech of

4 The irony is not just that this position conflicts directly with the rule reviewed last month by this Court in *Heiser v. Umbehr*, #94-1654, argued Nov. 28, 1995, but that it suggests that, under the "government speech" doctrine, the government can control the speech of third parties but not of itself.



its public employees, let alone to adopt a general prohibitory rule of sweeping applicability regarding such speech." *Id.*

Judge Kozinski,[5] on the other hand, pointed out that the majority's limiting of *Rosenberger* and *Rust* to government-funded private entities conflicted with both the words of this Court's opinion ("when *it* [the government] *is the speaker*") and "common sense." App 91a (emphasis by Judge Kozinski). "*Rust* and *Rosenberger* stand squarely for the proposition that the government may write the script when it is the speaker." App. 92a.

Similarly, Judge Fernandez, in dissent, wrote that "the State has the right to control the content of what it is paying for; it can control what is said by those who are acting on its behalf." App. 77a. Judge Fernandez also noted this Court's holding in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 466 (1979)(per curiam)(disagreement with public policy and disapproval of officials' responsiveness is to be registered principally at the polls.). App. 79a.

The extent of the First Amendment protections under the government speech doctrine is an important First Amendment issue, reviewed both this and last Term. The

5 In his "special concurrence" with his own opinion, Judge Reinhardt also rejected the "absolutist, authoritarian," App. 70a, government speech doctrine (as outlined by Judge Kozinski): "At the same time that Judge Kozinski callously ignores the interests of people, he stretches eagerly to place the powers of the government, in its role as speaker, beyond the reach of the Constitution. Indeed, it is the rights of the government that Judge Kozinski stresses at every opportunity. If Judge Kozinski had his druthers, public employees would be stripped of all First Amendment rights while performing their governmental functions." App. 68a.

majority opinion limiting this Court's "government speech" doctrine to private parties should be reviewed.

### B. The Majority Opinion Below Conflicts With This Court's Public Employee and Government Employer Speech Rights Decisions:

This Court has long permitted government employers to regulate the expression and activities of government employees, even off the job, if the speech affects their work. *Kelley v. Johnson*, 425 U.S. 238 (1976)(personal appearance of employees can be regulated); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557-65 (1973)(political activities can be regulated).

The majority below, however, noted that "Here the speech does not fit easily into any of the categories previously established in the case law . . . in part because here the employee is not simply commenting on a public issue but in speaking is actually performing his official duties." App. 38a-39a. Actually, the reason there is no such category is that this Court has never held that an employee has First Amendment rights while performing official duties.

Employees' rights to comment are those of "citizens," and do not apply to speech "*as an employee*." *NTEU*, 115 S.Ct. at 1013 (emphasis in original), *quoting, Connick v. Myers*, 461 U.S. 138, 147 (1983). Any "employee" First Amendment rights are substantially limited by the government's role as employer, *Waters v. Churchill*, 511 U.S. ___, __, 114 S.Ct. 1878, 1886 (1994), and as public policy-maker. *Minnesota State Board for Community Colleges v. Knight* ("*Minnesota*"), 465 U.S. 271, 286 (1984). "Appellees' status as public employees, however, gives them no special constitutional right to a voice in the making of policy by their government employer." *Minnesota*, 465 U.S. at 286.



The Courts of Appeals have split on how to handle public employees' First Amendment claims related closely to their official duties. The D.C. Circuit, voting 5-4 *en banc*, recently applied First Amendment protections to government employees' unapproved travel to speak on topics related to their official duties. *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995). The Sixth Circuit has said that conversations in the course of employment are not protected by the First Amendment. *Thomson v. Scheid*, 977 F.2d 107, 1021 (6th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2341 (1993). The Tenth Circuit has said that there is no *per se* exemption from First Amendment protection for officials' speech, *Koch v. City of Hutchinson*, 847 F.2d 1436, 1442 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988), and if a public employee's speech is to an audience beyond the employee's job description, the speech is more likely to be of public concern. *Considine v. Board of County Comm'rs*, 910 F.2d 695, 700 (10th Cir. 1990). None of these cases, however, involved speech **on behalf of** the government.

The majority below applied a variety of balancing and factual tests before concluding that the governmental interests supporting Article XXVIII were outweighed by the employee's interests impaired by the Article. App. 59a. Judge Fernandez, in dissent, succinctly refuted the majority's analysis by pointing out that "none of this is helpful to Yniguez, for the erosion of the restrictions upon employees has taken place in the area of their activities while they are **not performing government functions**." App. 74a (emphasis added).

Judge Kozinski, however, was more concerned with the majority's "central premise – the dangerous notion that government employees have a personal stake in the words

they utter when they speak for the government. The force of this idea will turn government employment into a platform for endless attacks on government policy and governance into a tug of war between those who make the laws and those who enforce them." App. 89a.

This Court dealt with employees' free speech rights twice last Term, but not with the rights of public employees whose claims involve speech **on behalf of** the government. This type of claim will arise much more frequently if the majority decision below is allowed to stand.

C. The Majority Opinion Below Conflicts with This Court's Decisions on Facial Invalidity:

"The elementary rule is that every reasonable construction must be resorted to in order to **save a statute** from unconstitutionality." *Rust v. Sullivan*, 500 U.S. __, __, 111 S.Ct. 1759, 1771 (1991)(emphasis in original), citing, *Edward J. Debartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988). Put even more forcefully, "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Rust*, 111 S.Ct. at 1771.

This rule was recently reiterated in *United States v. X-Citement Video*, __ U.S. __, 115 S.Ct. 464 (1994). This Court rejected "the most natural grammatical reading, adopted by the Ninth Circuit . . . both because of anomalies which result from this construction and because of the . . . presumption[] . . . that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." *Id.*, 115 S.Ct. at 467.

Yet the majority below refused to accept the limiting interpretations offered by Petitioner AOE and by the Arizona Attorney General, either of which would have obvi-



ated much, if not all, constitutional conflict – including the appropriateness of facial invalidity. App. 14a. The majority below's stunted constitutional analysis could lead other courts into substituting their own views when a proper interpretation would avoid a constitutional ruling.

In addition, the majority below struck down Article XXVIII in its entirety, even though it looked only at Subsection 3(1)(a) of Article XXVIII. Subsection 3(1)(b), for example, forbids the State from requiring individuals to use languages other than English, and Subsection 3(1)(c) requires documents to be in English to be enforceable. At least one Arizona court has found Subsection 3(1)(c) to be constitutional. *Robles v. Mofford*, No. 261837, (Sup. Ct. Pima County), Nov. 14, 1989 (requirement that petition to court be in English does not violate Constitution). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 414 U.S. 1, 109 (1976)(citation omitted).

D. The Decision Below Hinders Federalism and Ignores the Tenth Amendment.

The net effect of the majority decision below is to substitute federal judicial decisionmaking for that of States and local governments. As this Court noted over a century ago: "To [the States] nearly the whole charge of interior regulations is committed or left." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869). Like the choice of location of its own State Capitol, the choice of language a State shall use in conducting its affairs is a "function essential to [the State's] separate and independent existence. . ." *Coyle v. Oklahoma*, 221 U.S. 559, 595 (1911).

The Tenth Amendment was only limited, not repealed, when the Fourteenth Amendment was ratified. *EEOC v. Wyoming*, 460 U.S. 226, 259 (1983)(Burger, C.J., dissent-

ing); *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970)(Black, J., joined by the Chief Justice and three other justices)("And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous.").

The majority below's novel application of the First Amendment to a traditional State sovereign function ignores the principles of Federalism and the commands of the Tenth Amendment. The proper scope of the Tenth Amendment is a topic of substantial importance. *Cf. New York v. United States*, __ U.S. __, 112 S. Ct. 2408 (1992). *See, generally*, Anthony B. Ching, *Traveling Down the Unsteady Path: United States v. Lopez, New York v. United States, and the Tenth Amendment*, 29 Loy. L.A. L. Rev. 99 (1995).

The majority opinion below improperly limits the government speech doctrine, conflicts with other courts' decisions, and ignores this Court's directives on constitutional interpretation and federalism. The majority opinion below should be reviewed.

## CONCLUSION

For the reasons stated, the Court should grant the Petition for a Writ of Certiorari.

Respectfully Submitted,

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December 20, 1995

No. _____

# In The
# Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelley F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

## APPENDIX TO
## PETITION FOR WRIT OF CERTIORARI
## TO THE UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

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December 20, 1995

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## APPENDIX

69 F.3d 920

(Cite as: 1995 WL 600877 (9th Cir.(Ariz.)))

**Maria-Kelley F. YNIGUEZ; Jaime P. Gutierrez, Plaintiffs-Appellees, and Arizonans Against Constitutional Tampering, Intervenors-Plaintiffs-Appellees, and State of Arizona; Rose Mofford; Robert Corbin, et al., Defendants-Appellees,**

**v.**

**ARIZONANS FOR OFFICIAL ENGLISH; Robert D. Parks, Intervenors-Defendants-Appellants.**

Maria-Kelley F. Yniguez, Plaintiff-Appellant,

v.

State of Arizona; Rose Mofford; Robert Corbin, et al., Defendants-Appellees,

and

Arizonans for Official English; Robert D. Parks, Intervenors-Defendants-Appellants.

Maria-Kelley F. Yniguez, Plaintiff-Appellee,

v.

State of Arizona; Rose Mofford; Robert Corbin, et al., Defendants-Appellants.

Nos. 92-17087, 93-15061, 93-15719.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted May 3, 1994.

Filed Dec. 7, 1994.

Amended Jan. 17, 1995.

Order Granting Rehearing En Banc Filed May 12, 1995.

Argued and Submitted July 20, 1995.

Filed Oct. 5, 1995.

Appeals from the United States District Court for the District of Arizona Paul G. Rosenblatt, District Judge, Presiding.

Before WALLACE, Chief Judge, HUG, Jr., PREGERSON, REINHARDT, HALL, WIGGINS, BRUNETTI, KOZINSKI, FERNANDEZ, KLEINFELD, and HAWKINS, Circuit Judges.

REINHARDT, Judge.

These consolidated appeals require us to consider an important area of constitutional law, rarely reexamined since a series of cases in the 1920s in which the Supreme Court struck down laws restricting the use of non-English languages. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); *Farrington v. Tokushige*, 273 U.S. 284 (1927). Here, once again, the state has chosen to use its regulatory powers to try to require the exclusive use of the English language.

Specifically at issue in this case is the constitutionality of Article XXVIII of the Arizona Constitution. Article XXVIII provides, inter alia, that English is the official language of the state of Arizona, and that the state and its political subdivisions--including all government officials and employees performing government business--must "act" only in English. Arizonans for Official English and its spokesman Robert D. Parks[1] appeal the district court's declaratory judgment that Article XXVIII is facially overbroad in violation of the First Amendment. Maria-Kelly Yniguez, a former Arizona state employee who brought the present action, appeals the district court's denial of nominal damages.

This case raises troubling questions regarding the constitutional status of language rights and, conversely, the

1 All further references to Arizonans for Official English also include by implication Parks.



state's power to restrict such rights. There are valid concerns on both sides. In our diverse and pluralistic society, the importance of establishing common bonds and a common language between citizens is clear. *See Guadalupe Organization, Inc. v. Tempe Elementary School Dist.*, 587 F.2d 1022, 1027 (9th Cir.1978). Equally important, however, is the American tradition of tolerance, a tradition that recognizes a critical difference between encouraging the use of English and repressing the use of other languages. Arizona's rejection of that tradition has severe consequences not only for its public officials and employees, but for the many thousands of Arizonans who would be precluded from receiving essential information from their state and local governments if the drastic prohibition contained in the provision were to be implemented. In deciding this case, therefore, we are guided by what the Supreme Court wrote in *Meyer*: The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution--a desirable end cannot be promoted by prohibited means. 262 U.S. at 401.

We conclude that Article XXVIII constitutes a prohibited means of promoting the English language and affirm the district court's ruling that it violates the First Amendment.[2]

A three-judge panel of this court issued an opinion reaching this same conclusion last year. *Yniguez v. Ari-*

2 We also hold that Yniguez is entitled to nominal damages. Given our affirmance on the merits, we need not rule upon the state defendants' claim that, in the event of a reversal, the plaintiff's attorney's fees award should be vacated.

*zonans for Official English*, 43 F.3d 1217 (9th Cir.1995). We then decided to reconsider the question en banc. 53 F.3d 1084 (9th Cir. 1995). Having done so, we conclude that our opinion was correct. Because the opinion was withdrawn when we went en banc, we re-publish it now, with only a few changes that discuss the applicability of intervening Supreme Court cases or expand on points that warrant further explanation. In almost all respects, however, our en banc opinion is identical to the opinion issued by the three-judge panel.[3]

## I.

### Factual Background

In October 1987, Arizonans for Official English initiated a petition drive to amend Arizona's constitution to prohibit the government's use of languages other than English. The drive culminated in the 1988 passage by ballot initiative of Article XXVIII of the Arizona Constitution, entitled "English as the Official Language." The measure passed by a margin of one percentage point, drawing the affirmative votes of 50.5% of Arizonans casting ballots in the election. Under Article XXVIII, English is "the official language of the State of Arizona": "the language of ... all government functions and actions." ss 1(1) & 1(2) (see appendix). The provision declares that the "State and all [of its] political subdivisions"--defined as

3 Judge Thomas Tang of Arizona was a member of the three-judge panel and the en banc court. He died on July 18, 1995, two days before the en banc oral argument. He was replaced on the en banc court by Judge Kozinski. Because the decision of the en banc court is essentially identical to the panel opinion, it is important to note that Judge Tang contributed greatly to that earlier opinion. Many of the ideas and much of the language was his. Although he was unable to participate in the deliberations of the en banc court, this decision reflects his views and his wise understanding of the Constitution.



including "all government officials and employees during the performance of government business"--"shall act in English and no other language." ss 1(3)(a)(iv) & 3(1)(a).

At the time of the passage of the article, Yniguez, a Latina, was employed by the Arizona Department of Administration, where she handled medical malpractice claims asserted against the state. She was bilingual--fluent and literate in both Spanish and English.[4] Prior to the article's passage, Yniguez communicated in Spanish with monolingual Spanish-speaking claimants, and in a combination of English and Spanish with bilingual claimants.

State employees who fail to obey the Arizona Constitution are subject to employment sanctions. For this reason, immediately upon passage of Article XXVIII, Yniguez ceased speaking Spanish on the job. She feared that because of Article XXVIII her use of Spanish made her vulnerable to discipline.

In November 1988, Yniguez filed an action against the State of Arizona, Governor Rose Mofford, Arizona Attorney General Robert Corbin, and Director of the Arizona

4 It should be noted that the bulk of the underlying facts in this case were stipulated to by Yniguez and the state defendants. Arizonans for Official English, however, makes certain factual allegations in its briefs on appeal that are unsupported or even contradicted by the record. Compare Opening Brief at 24 (Yniguez' use of Spanish "would interfere with the government's substantial interest in the efficiency of its workforce") with Stipulated Facts at 5 (Yniguez' use of Spanish "contributes to the efficient operation of the State"). Nonetheless, the organization made no effort to supplement the record on appeal or to seek a remand. Rather, it explicitly states in its brief that there are no material facts in dispute. At any rate, the facts stipulated to by Yniguez and the state defendants are in the main self-evident. Accordingly, our legal conclusions are based on the record as stipulated to by the original parties.

Department of Administration Catherine Eden, in federal district court.[5] She sought an injunction against state enforcement of Article XXVIII and a declaration that the provision violated the First and Fourteenth Amendments of the Constitution, as well as federal civil rights laws.

Yniguez's complaint was subsequently amended to include Jaime Gutierrez, a Hispanic state senator from Arizona, as a plaintiff. Gutierrez stated that, prior to the passage of Article XXVIII, he spoke Spanish when communicating with his Spanish-speaking constituents and that he continued to do so even after the article's passage. He claimed, however, that he feared that in doing so he was liable to be sued pursuant to Article XXVIII's enforcement provision.

The state defendants all moved for dismissal, asserting various jurisdictional bars to the action. While these motions were pending, the plaintiffs conducted discovery and compiled the defendants' admissions to interrogatories into a Statement of Stipulated Facts, filed with the district court in February 1989. Also filed with the court was the Arizona Attorney General's opinion regarding the interpretation of Article XXVIII, which explained that, "to avoid possible conflicts with the federal ... constitution[ ]," the Attorney General had concluded that the Article only covered the "official acts" of the Arizona government. Finally, the court heard testimony from Yniguez, Senator Gutierrez, and Jane Hill, a linguistic anthropologist, about the adverse impact of Article XXVIII on their speech rights, and the speech rights of the Hispanic population of Arizona.

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5 Yniguez' original complaint, filed November 10, 1988, named only the State of Arizona as a defendant. She later filed an amended complaint including the other defendants.



The district court issued its judgment and opinion on February 6, 1990. *Yniguez v. Mofford*, 730 F.Supp. 309 (D.Ariz.1990). First, the district court resolved the defendants' jurisdictional objections. The court reiterated a previous ruling that the Eleventh Amendment protects the State of Arizona from suit, and then ruled that Gutierrez's claims were barred as to all of the defendants. *Id.* at 311. It reasoned that because state executive branch officials lack authority to prosecute members of the legislative branch, none of the defendants had enforcement power against Gutierrez sufficient to satisfy the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). In addition, the court held that *Ex parte Young* barred Yniguez's claim against the Attorney General because he had no specific authority to enforce Article XXVIII. Although the court found that Director Eden had authority to enforce Article XXVIII against Yniguez, it nonetheless held that, because Eden had not threatened to do so, she too should be dismissed as a defendant. The court did find, however, that Governor Mofford both had the authority to enforce Article XXVIII against Yniguez, and had sufficiently threatened to do so for Yniguez to maintain an action against her in accordance with *Ex parte Young*.[6]

The district court then reached the merits of Yniguez's claim. 730 F.Supp. at 313. It read Article XXVIII as barring state officers and employees from using any language other than English in performing their official duties, except to the extent that certain limited exceptions described in the provision applied. Finding that Article XXVIII, thus construed, infringed on constitutionally protected speech,

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6 In particular, the court relied on the fact that "Mofford has officially stated that she intends to comply With Article XXVIII and expects state service employees, of which Yniguez is one, to comply with Article XXVIII." *Yniguez*, 730 F.Supp. at 312.

the district court ruled that the provision was facially overbroad in violation of the First Amendment.[7] While granting declaratory relief, the court denied injunctive relief because no enforcement action was pending. Notwithstanding the district court's holding that a provision of the Arizona Constitution was unconstitutional under the United States Constitution, Governor Mofford--an outspoken critic of Article XXVIII--decided not to appeal the judgment. Senator Gutierrez, being satisfied with the constitutional determination, did not appeal the ruling that his claim was barred by *Ex Parte Young*.

In response to the state's decision not to appeal, Arizonans for Official English moved to intervene post-judgment pursuant to Fed.R.Civ.P. 24(a), for the purpose of pursuing an appeal of the district court's order. Immediately thereafter, the Arizona Attorney General sought to intervene pursuant to 28 U.S.C. s 2403(b) for the same purpose. The Attorney General also asked that the district court amend the judgment because it did not contain a ruling on the defendants' prior motion to certify to state court the question of Article XXVIII's proper interpretation. The district court denied all three motions. *See Yniguez v. Mofford*, 130 F.R.D. 410 (D.Ariz.1990) (holding, *inter alia*, that denial of certification was implicit in previous judgment, and that certification was inappropriate because Article XXVIII is not susceptible of a narrowing construction).

*4 On July 19, 1991, we reversed the district court's denial of the intervention motion of Arizonans for Official English. *Yniguez v. Arizona*, 939 F.2d 727, 740 (9th

7 Because the district court found that Article XXVIII violated the First Amendment, it did not reach the other constitutional and statutory grounds that Yniguez asserted for invalidating the provision.



Cir.1991) (*"Yniguez I"*). We ruled that because the organization was the principal sponsor of the ballot initiative codified as Article XXVIII, its relationship to the provision was analogous to the relationship of a state legislature to a state statute. Specifically, we found that, as the initiative's sponsor, the group had "a strong interest in the vitality of a provision of the state constitution which [it had] proposed and for which [it had] vigorously campaigned." *Id.* at 733. Consequently, we held that Arizonans for Official English satisfied both the requirements of Rule 24(a) and the standing requirements of Article III, and could thus intervene for purposes of appeal. *Id.* at 740. In the same opinion, we affirmed the district court's denial of the Attorney General's motion to intervene insofar as he sought to be reinstated as a party to the appeal, but permitted his intervention pursuant to 28 U.S.C. s 2403(b) for the limited purpose of arguing the constitutionality of Article XXVIII. *Id.*

After we issued our opinion regarding intervention, the state filed a suggestion of mootness based on Yniguez's resignation from the Arizona Department of Administration in April 1990. In our second opinion in this case, *Yniguez v. Arizona*, 975 F.2d 646, 647 (9th Cir.1992) (*"Yniguez II"*), we rejected the state's mootness suggestion, reasoning that Yniguez had the right to appeal the district court's failure to award her nominal damages. *Id.* On December 15, 1992, after Arizonans for Official English filed its notice of appeal in the district court, Yniguez filed her notice of cross-appeal requesting nominal damages.[8]

8 Asking this court to revisit issues already decided in *Yniguez II*, the cross-appellee state defendants assert that Yniguez's request for nominal damages is untimely because such damages were not specifically requested at trial, and their denial was not specifically

The district court subsequently granted Yniguez's motion for an award of attorney's fees, and the state defendants conditionally appealed that ruling. Their appeal was consolidated with the original appeal on the merits filed by Arizonans for Official English and Yniguez's cross-appeal for nominal damages. All three appeals are now before us, although we do not reach the one relating to attorney's fees. *See* note 2, supra. To round out the procedural framework, we note that in 1994 we granted the motion of Arizonans Against Constitutional Tampering and its chairman Thomas Espinosa[9] to intervene as plaintiffs-appellees in the case. Arizonans Against Constitutional Tampering was

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appealed at that time. However, as we held in *Yniguez II*, Yniguez's blanket request for "all other relief that the Court deems just and proper under the circumstances," encompasses a request for nominal damages. 975 F.2d at 647. In addition, as to her appeal of the district court's denial of such damages, Yniguez has precisely followed the steps we described in that opinion. *See id.* at 647 & n. 2 (stating that Yniguez "may raise the issue of nominal damages in a future cross-appeal"). Similarly, Yniguez suggests that the appeal of Arizonans for Official English is untimely because its notice of appeal was not filed within thirty days of the date that our order permitting intervention was entered on the district court's docket. However, we retained jurisdiction over the case during that period in reviewing the suggestion of mootness filed by the state. We did not relinquish jurisdiction until after September 16, 1992, when we filed our opinion rejecting the mootness suggestion. In that opinion, we specifically explained that "[t]he district court may now proceed to allow the parties to perfect their appeals and to conduct further proceedings in conformity with our dispositions." *Yniguez II*, 975 F.2d at 648. Although for some reason no mandate issued thereafter, the district court received the case back on November 5, 1992, and Arizonans for Official English timely filed its notice of appeal within thirty days of that date.

9 All further references to Arizonans Against Constitutional Tampering include by implication Espinosa.



the principal opponent of the ballot initiative that became Article XXVIII, had campaigned against it, and, like Arizonans for Official English, had submitted an argument regarding the initiative's merits which appeared in the official Arizona Publicity Pamphlet. *Cf. Yniguez I*, 939 F.2d at 733 (noting that sponsors of a ballot initiative have a strong interest in defending provision they campaigned for, so that there is a "virtual per se rule" that they may intervene in litigation involving it). However, in reaching our decision, which provides all the relief that Arizonans Against Constitutional Tampering seeks, we need not rely on that group's standing as a party. Yniguez's standing and that of the other parties and intervenors is sufficient to support the determination that we make here.

## II

## The Proper Construction of Article XXVIII

### A.

### The District Court's Construction

Although eighteen states have adopted "official-English" laws,[10] Arizona's Article XXVIII is "by far the most

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10 The federal government of the United States has never recognized English as the "official language," either under the Constitution or federal law. *See* generally Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English, 77 Minn. L.Rev. 269, 271-81 (1992) (noting that Continental Congress issued official publications in German and French, as well as English, and that the Framers purposely gave no special designation to English). As one academic commentator has explained, "early political leaders recognized the close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on these freedoms." Heath, Language and Politics in the United States, in Linguistics and Anthropology 267, 270 (1977). Recent efforts to establish English as the official national language have

restrictively worded official-English law to date." Note, English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights, 7 J.L. & Pol. 325, 337 (1991).[11] Besides declaring English "the official

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not succeeded. See H.R.J. Res. 81, 101st Cong., 1st. Sess. (1989); S.J. Res. 13, 100th Cong., 1st Sess. (1987); see also Comment, The Proposed English Language Amendment: Shield or Sword?, 3 Yale L & Pol'y Rev. 519 (1985); *Harris v. \Rivera Cruz*, 710 F.Supp. 29, 31 (D.P.R.1989) (stating that "[i]n the United States, there is no official language, and if prudence and wisdom (and possibly the Constitution) prevail, there never shall be"). But *cf. Soberal-Perez v. Heckler*, 717 F.2d 36, 42 (2d Cir.1983) (asserting that "English is the national language of the United States"), *cert. denied*, 466 U.S. 929 (1984); *DaLomba v. Director*, 337 N.E.2d 687, 689 (Ma.1975) (stating that "English is the official language of this country").

11 Besides Arizona, the states that have adopted such provisions are: Alabama, Ala. Const. amend. 509; Arkansas, Ark.Code Ann. s 1-4-117; California, Cal. Const. art. III s 6; Colorado, Colo. Const. Art. II s 309; Florida, Florida Const. art. II s 9; Georgia, Ga.Code Ann. s 50-3- 30; Hawaii, Haw, Const. art. XV s 4; Illinois, Ill.Code s 460/20; Indiana, Ind.Code Ann. s 1-2-10-1; Kentucky, Ky.Rev.Stat. Ann. s 2.013; Mississippi, Miss.Code Ann. s 3-3-31; Nebraska, Neb. Const. art. I s 27; North Carolina. N.C. Gen.Stat. s 145-12; North Dakota, N.D. Cent.Code s 54-02-13; South Carolina, S.C.Code Ann. s 1-1-696; Tennessee, Tenn.Code Ann. s 4-1-404; and Virginia, Va.Code Ann. s 22.1-212.1. *Compare Meyer*, 262 U.S,. at 395 (stating that "twenty-one States besides Nebraska have enacted similar foreign language laws") (argument of defendant). Two of these states – California and Hawaii – are in our circuit. The "official-English" provisions in these states, like those of other states besides Arizona, appear to be primarily symbolic. *See, e.g., Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 577 (7th Cir.1973) (noting that official-English law appears with laws naming state bird and state song, and does not restrict use of non-English languages by state and city agencies). Article III, section 6 of the California Constitution merely establishes English as the official language of the state of California; it



language of the State of Arizona," Article XXVIII states that English is "the language of ... all government functions and actions." ss 1(1), 1(2). The article further specifies that the state and its subdivisions--defined as encompassing "all government officials and employees during the performance of government business"--"shall act in English and no other language." ss 1(3)(a)(iv), 3(1)(a). Its broad coverage is punctuated by several exceptions permitting, for example, the use of non-English languages as required by federal law, s 3(2)(a), and in order to protect the rights of criminal defendants and victims of crime, s 3(2)(e).

The district court, interpreting what it found to be the "sweeping language" of Article XXVIII, determined that the provision prohibits: the use of any language other than English by all officers and employees of all political subdivisions in Arizona while performing their official duties, save to the extent that they may be allowed to use a foreign language by the limited exceptions contained in s 3(2) of Article XXVIII. *Yniguez*, 730 F.Supp. at 314.

For reasons we explain below, we agree with the district court's construction of the article.

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imposes no prohibition on other languages and does not affect their use in the functioning of state government. Hawaii's provision is unlike California's in that it recognizes both English and Hawaiian as official state languages, but it too appears to have little practical effect. Given the extent to which the California and Hawaii provisions differ from Article XXVIII, our opinion in this case should not be construed as expressing any view regarding their constitutionality.

## B.

### The Attorney General's Construction

The Arizona Attorney General proffers a highly limited reading of Article XXVIII under which it applies only to "official acts" of state governmental entities.[12]

According to this construction of the provision, which the Attorney General has memorialized in a written opinion, the provision "does not mean that languages other than English cannot be used when reasonable to facilitate the day-to-day operation of government." Op. Atty. Gen. Az. No. 189-009 (1989).

12 At the oral argument before the panel, Arizonans for Official English partially endorsed the Attorney General's reading of Article XXVIII. While purporting to agree with the Attorney General that the provision's mandate that the state and its subdivisions "shall act in English" covered only official governmental acts, the organization nonetheless suggested vaguely that its interpretation of the provision was broader than that of the Attorney General, and that it might, for example, construe the provision as prohibiting state employees from speaking another language in the performance of their duties when unnecessary to do so. The organization's briefs to the panel were even less clear in indicating its position regarding Article XXVIII's proper scope. The briefs were, first of all, quite reticent on the question. However, the arguments asserted in support of the provision were quite sweeping, and seemed most appropriate to an extremely broad prohibition on the use of non-English languages by government officials and employees. Although we would, even absent these briefs, be entirely unconvinced by the proffered limiting construction (see below), we find "[t]hat construction even less plausible in light of the broad purposes that [the appellants] insist[ ] underlie the [provision]." *Luind v. Grimmer*, 30 F.3d 1115, 1123 n. 8 (9th Cir.1994) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975)). Before the en banc court, Arizonans for Official English's and the Attorney General's explanations as to the initiative's scope were confused and self- contradictory. At best, they shed little light on how the amendment could rationally be construed in a limiting manner and at worst they helped make it clear that it could not be.



The Supreme Court has, in the past, looked to the narrowing construction given a provision by the State's Attorney General as a guide to evaluating the provision's scope. *Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973). For two reasons, however, we do,not adopt the Attorney General's construction of Article XXVIII in this case. First, the Attorney General's opinion is not binding on the Arizona courts, *Marston's Inc. v. Roman Catholic Church of Phoenix*, 644 P.2d 244, 248 (Ariz.1982), and is therefore not binding on this court. *Compare Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395 (1988) (refusing to accept as authoritative a non-binding attorney general opinion), with *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (accepting city's binding narrow interpretation). Second, we cannot adopt the Attorney General's limiting construction because it is completely at odds with Article XXVIII's plain language. The Supreme Court has made clear that a limiting construction will not be accepted unless the provision to be construed is "readily susceptible" to it. *American Booksellers Ass'n*, 484 U.S. at 397. Here, Article XXVIII's clear terms are simply not "readily susceptible" to the constraints that the Attorney General attempts to place on them.

The Attorney General's reading of Article XXVIII focuses on s 3(1)(a), which provides, with limited exceptions, that the "State and all political subdivisions of this State shall act in English and in no other language." s 3(1)(a). The Attorney General takes the word "act" from s 3(1)(a) and engrafts onto it the word "official," found in the Article's proclamation of English as the official language of Arizona. In thus urging that the Article only applies to the "official acts" of the state, he also relies on a limited meaning of the noun "act," defined as a "decision or determination of a sovereign, a legislative council, or a

court of justice." Op. Atty. Gen. Az. No. 189-009, at 21 (quoting Webster's International Dictionary 20 (3d. ed., unabridged, 1976) (third sense of "act")). In doing so, however, he ignores the fact that "act," when used as a verb as in Article XXVIII, does not include among its meanings this limited one.[13] Moreover, even were such a meaning somehow plausible if the two phrases were examined out of context, it is contradicted by the remainder of the provision.

Section 1(3)(a)(iv) broadly declares that the rule that Arizona "act in English and in no other language" applies to all government officials and employees during the performance of government business. This prohibition on the use of foreign languages when conducting government business supplements the Article's listing of "statutes, ordinances, rules, orders, programs and policies," an enumeration of presumably official acts on which the Attorney General relies heavily. s 1(3)(iii). Thus, not only is the Attorney General's narrow reading of Article XXVIII contradicted by the provision's expansive language, his reading would render a sizeable portion of the Article superfluous, "violating the settled rule that a [provision] must, if possible, be construed in such fashion that every word has

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13 Similarly, Article XXVIII also describes English as the language of "all government functions and actions." s 1(2). Under no sense of either "functions" or "actions", are the two words limited to official acts. *Cf. Powers v. Ohio*, 499 U.S. 400 (1991) (finding state action in prosecutor's peremptory challenges of prospective jury members). We note also that the initiative's ballot materials and publicity pamphlets do not support the Attorney General's post-hoc construction of Article XXVIII. Instead, they described the "meaning and purpose," of the initiative to the voters in far broader terms. *See Bussanich v. Douglas*, 733 P.2d 646, 647 (Ariz.App.1986) (examining ballot materials and publicity pamphlets in construing an initiative).



some operative effect." *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992) (emphasis added); *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 & n. 11 (1988). Here, of course, it is not simply certain words that would, under the Attorney General's reading, become redundant; instead, entire subsections of the provisions would be rendered unnecessary and repetitive.

Indeed, the district court's broader construction of Article XXVIII is the only way to give effect to any of the exceptions contained in s 3(2). If, for example, public teachers in the regular course of their teaching duties would not otherwise be covered by the provision, then there would be no reason to include specific exceptions for some of their duties. See s 3(2)(a) & (c). Moreover, the provision's clear and specific exclusion of some of the functions of public teachers indicates that the measure on its face applies to other "government employees" performing other types of governmental duties that are not specifically excluded--employees such as clerks at the Department of Motor Vehicles or receptionists at state welfare offices, and other state employees who deliver services to the public. Public teachers' duties do not constitute "official acts" of the state any more or any less than do the duties of these other categories of employees.

Certainly, there is no justification in the text of Article XXVIII for the Attorney General's ingenious suggestion that languages other than English may be used whenever such use would reasonably "facilitate the day-to-day operation of government"-- that, in other words, the provision's plain and unequivocal prohibition on the use of other languages may be ignored if it is expedient to do so. To read such a broad and general exception into Article XXVIII would run directly contrary to its structure, scope, and purpose, and would effectively nullify the bulk of its coverage. Article XXVIII plainly does not set forth an in-

nocuous, pragmatic rule that tolerates the use of languages other than English whenever beneficial to the public welfare. Its mandate is precisely the opposite. The use of languages other than English is banned except when expressly permitted. Indeed, the narrow exceptions that set forth the limited circumstances under which non-English languages may be spoken directly belie the conveniently flexible approach that the Attorney General has adopted for purposes of attempting to resurrect a facially unconstitutional measure.

## C.

### Abstention and Certification

The Attorney General argues, alternatively, that because the Arizona state courts have not had an opportunity to interpret Article XXVIII, we should abstain from deciding this case and certify the question of the proper interpretation of Article XXVIII to the Arizona Supreme Court. *See* Ariz.Rev.Stat. Ann. s 12-1861 (permitting federal courts to certify questions of state law to Arizona Supreme Court).

First, we note that a federal court should abstain only in exceptional circumstances, *Lind*, 30 F.3d at 1121 (citing *Houston v. Hill*, 482 U.S. 451, 467 (1987)), and should be especially reluctant to abstain in First Amendment cases, *Ripplinger v. Collins*, 868 F.2d 1043, 1056 (9th Cir.1989). Abstention pending a narrowing construction of a provision by the state courts is inappropriate where the provision is "justifiably attacked on [its] face as abridging free expression." Id. at 1048 (citations and quotations omitted). In fact, the Supreme Court has made it clear that whenever federal constitutional rights are at stake "the relevant inquiry is not whether there is a bare, though unlikely possibility that the state courts might render adjudication of the federal question unnecessary." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 (emphasis in original). "Rather," the Court continued, "'we have frequently em-



phasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction.'" *Id.* (quoting *Zwickler v. Koota*, 389 U.S. 241, 251 & n. 14.). It follows that a court may not abstain and certify a question of statutory interpretation if the statute at issue requires "a complete rewrite" in order to pass constitutional scrutiny. *Lind*, 30 F.3d at 1121 (citing *Houston*, 482 U.S. at 470-71).

To be sure, the Supreme Court in *American Booksellers* did opt to certify the question of the proper interpretation of a statute to the Virginia Supreme Court. 484 U.S. at 386. However, *American Booksellers* presented the Court with a "unique factual and procedural setting." *Id.* In that case, the plaintiffs had filed a pre-enforcement challenge to a state obscenity statute that the State Attorney General conceded would be unconstitutional if construed as the plaintiffs contended it should be. *Id.* at 393 & n. 8 (quoting state counsel as saying that if the plaintiffs' interpretation of the statute were correct, then the state "should lose the case"). Moreover, there were no non-governmental defendants such as Arizonans for Official English in the case, no state court had ever had the opportunity to interpret the pertinent statutory language, and both levels of lower federal courts had made critically flawed assessments of the statute's coverage because they had relied on invalid evidence. *Id.* at 395-97.

The Attorney General here, in contrast, has never conceded that the statute would be unconstitutional if construed as Yniguez asserts it properly should be.[14] More-

14 The Attorney General has only stated that a narrow construction "may ... be necessary to avoid conflict" with the federal constitution, and his analysis on the point was based on the Equal Protection Clause of the Fourteenth Amendment rather than the First Amendment.

over, at least one Arizona state court has had the opportunity to construe Article XXVIII, and has done nothing to narrow it. *See Ruiz v. State*, No. CV 92-19603 (Jan. 24, 1994) (disposing of First Amendment challenge in three paragraphs). Thus, unlike in *Virginia Booksellers*, there are no unique circumstances in this case militating in favor of certification. *See Lind*, 30 F.3d 1122 n. 7 (declining to certify question of state law interpretation in the absence of state concession that law would be unconstitutional on the plaintiff's construction). Accordingly, we must proceed to determine the constitutionality of Article XXVIII.

**D.**

**Conclusion**

We agree with the district court's construction of Article XXVIII. The article's plain language broadly prohibits all government officials and employees from speaking languages other than English in performing their official duties, save to the extent that the use of non-English languages is permitted pursuant to the provision's narrow exceptions section. We reject both the Attorney General's narrowing construction of the article and his suggestion of abstention and certification. We conclude that were an Arizona court ever to give the broad language of Article XXVIII a limiting construction similar to that proffered by the Attorney General, it would constitute a "remarkable job of plastic surgery upon the face of the [provision]." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1963). Where, as here, a state provision has been challenged on federal constitutional grounds and a state's limiting construction of that provision would directly clash with its plain meaning, we should neither abstain nor certify the question to the state courts. Rather, under such circumstances, it is our duty to adjudicate the constitutional question without delay.



**III.**

**Article XXVIII and The First Amendment**

**A.**

**Overbreadth**

After construing Article XXVIII, the district court ruled that it was unconstitutionally overbroad. Under the over-breadth doctrine, an individual whose own speech may constitutionally be prohibited under a given provision is permitted to challenge its facial validity because of the threat that the speech of third parties not before the court will be chilled. *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987). Moreover, a party may challenge a law as facially overbroad that would be unconstitutional as applied to him so long as it would also chill,the speech of absent third parties. *Lind*, 30 F.3d at 1122-23 (finding statute unconstitutionally overbroad as well as unconstitutional as applied to plaintiff). The facial invalidation that overbreadth permits is necessary to protect the First Amendment rights of speakers who may fear to challenge the provision on their own. *See Brockett v. Spokane Arcades*, 472 U.S. 491, 503 (1985). However, in order to support a facial overbreadth challenge, there must always be a "realistic danger" that the provision will significantly compromise the speech rights involved. *Board of Airport Comm'rs*, 482 U.S. at 574.

A provision will not be facially invalidated on overbreadth grounds unless its overbreadth is both real and substantial judged in relation to its plainly legitimate sweep, and the provision is not susceptible to a narrowing construction that would cure its constitutional infirmity. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973); *United States v. Austin*, 902 F.2d 743, 744 (9th Cir.1990), *cert. denied*, 498 U.S. 874 (1990). Accordingly, a law will not be facially invalidated simply because it has

some conceivably unconstitutional applications. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Rather, to support a finding of overbreadth, there must be a substantial number of instances in which the provision will violate the First Amendment. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988).

Yniguez contends that Article XXVIII unlawfully prevented her from speaking Spanish with the Spanish-speaking claimants that came to her Department of Administration office. Yniguez, however, challenges far more than Article XXVIII's ban on her own use of Spanish in the performance of her own particular job. She also contends that the speech rights of innumerable employees, officials, and officers in all departments and at all levels of Arizona's state and local governments are chilled by Article XXVIII's expansive reach. At least as important, she contends that the interests of many thousands of non-English-speaking Arizonans in receiving vital information would be drastically and unlawfully limited. For those reasons, she challenges Article XXVIII as overbroad on its face and invalid in its entirety.

Article XXVIII's ban on the use of languages other than English by persons in government service could hardly be more inclusive. The provision plainly states that it applies to "the legislative, executive, and judicial branches" of both state and local government, and to "all government officials and employees during the performance of government business." ss 1(3)(a)(i)(ii) & (iv). This broad language means that Article XXVIII on its face applies to speech in a seemingly limitless variety of governmental settings, from ministerial statements by civil servants at the office to teachers speaking in the classroom, from town-hall discussions between constituents and their representatives to the translation of judicial proceedings in the courtroom.[15] Under the article, the Arizona



state universities would be barred from issuing diplomas in Latin, and judges performing weddings would be prohibited from saying "Mazel Tov" as part of the official marriage ceremony. Accordingly, it is self-evident that Article XXVIII's sweeping English-only mandate limits the speech of governmental actors serving in a wide range of work-related contexts that differ significantly from that in which Yniguez performed her daily tasks. The speech rights of all of Arizona's state and local employees, officials, and officers are thus adversely affected in a potentially unconstitutional manner by the breadth of Article XXVIII's ban on non-English governmental speech. Similarly, the interests of non-English-speaking Arizonans in receiving all kinds of essential information are severely burdened. For these reasons, we cannot say that the provision's "only unconstitutional application is the one directed at a party before the court...." *Lind*, 30 F.3d at

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15 The district court held that the Eleventh Amendment barred State Senator Gutierrez from suing state officials in federal court to challenge Article XXVIII's application to legislators. The district court concluded that these state officials lacked the power to enforce Article XXVIII against him and thus could not be proper federal defendants under *Ex Parte Young*. *See Yniguez*, 730 F. Supp, at 311. This ruling is not before us on appeal and we intimate no opinion as to its merits. However, it is important to note that the court's ruling does not mean that Article XXVIII's broad reach imposes no chilling effect upon the speech of legislators. Even if it were true that state officials have no authority to punish a legislator who violates Article XXVIII, it remains the case that legislators are required to comply with the state constitution and that harmful consequences may flow from violation of its provisions, including the possibility of civil liability as a result of the initiative's enforcement provision. Thus, whatever Gutierrez's particular power to bring this suit in federal court, the First Amendment interests of state legislators are properly considered as part of an inquiry into Article XXVIII's overbreadth.

1122. Therefore, Yniguez's challenge to Article XXVIII properly implicates overbreadth analysis and, if unconstitutional, "the entire [provision] may be invalidated to protect First Amendment interests." *Id.*

Facial invalidation is also appropriate here because the broad language employed throughout Article XXVIII relates to a single subject and is based on a single premise, which, as we will discuss subsequently, is constitutionally flawed. In cases such as this, where the provision in question "in all its applications ... operates on a fundamentally mistaken premise," *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984), the Supreme Court "has not limited itself to refining the law by preventing improper applications on a case-by-case basis." *Id.* at 965 n. 13. Rather, the Court will simply strike down the provision on its face. "[W]here the defect in the [provision] is that the means chosen to accomplish the state's objectives are too imprecise, so that in all its applications the [provision] creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack." *Id.* at 967-68.

Moreover, the nature and structure of Article XXVIII is such that if we determine it to be unconstitutionally overbroad, then we must invalidate the entire article and not simply some of its sections. Even a cursory reading of Article XXVIII demonstrates that the provision is an integrated whole that seeks to achieve a specific result: to prohibit the use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English. There is no fair reading of the article that would permit some of its language to be divorced from this overriding objective.

Equally important, the article contains no severability provision that would suggest that any clause or section was intended to survive if other parts were held unconsti-



tutional, *cf. Brockett*, 472 U.S. at 506 (citing a statute's severability clause as an important factor favoring partial rather than facial invalidation), and the parties before the court have never treated Article XXVIII as anything other than a single entity that must stand or fall as a whole. Indeed, appellees have always presented Article XXVIII as an integrated provision that is designed to eliminate a non-English words from governmental speech, although they have pressed for an artificially narrow construction of what constitutes such speech. Thus, if the article's specific restrictions on the use of languages other than English are unconstitutionally overbroad, then the language and structure of the amendment makes facial invalidation of the entire article the only appropriate remedy.

As we noted at the outset of this section, however, Article XXVIII will only be unconstitutionally overbroad if it violates the First Amendment in a substantial number of instances. *New York State Club Ass'n*, 487 U.S. at 13. To determine whether Article XXVIII's restrictions unconstitutionally impose on the speech rights of a substantial number of persons in government service in a substantial number of instances, we need only consider the article's impact on Arizona's numerous state and local public employees. In sheer number, these employees represent the most substantial target of Article XXVIII's restrictions on speech in languages other than English as they constitute the most common source of communications between the government and the public that it serves. In addition, a determination that Article XXVIII unconstitutionally infringe's on the First Amendment rights of these employees will necessarily result in the conclusion that the article also unlawfully chills the speech of many others who serve in government, such as judges and legislators. The same restrictions that are unconstitutional as to the routine speech often engaged in by civil servants will a fortiori be unconstitutional as to the various kinds of speech engaged in by

a substantial number of other persons who work in government and are therefore affected by the article's unusually broad reach. *See Yniguez*, 730 F.Supp. at 314; *Cf. Bond v. Floyd*, 385 U.S. 116, 132-33 (a state may not impose stricter First Amendment standards on legislators).[16]

Yniguez's challenge to Article XXVIII thus presents us with a clear issue. If we determine that Article XXVIII's impact on the speech rights of public employees is unconstitutional, we will be compelled to invalidate Ar-

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16 The Court's recent decision in *United States v. National Treasury Employees Union*, 115 S.Ct. 1003 (1995), is entirely consistent with our conclusion that if we find Article XXVIII to be unconstitutional, we must invalidate it on its face. In *National Treasury Employees Union*, the Court considered a challenge to a part of a statute that restricted the ability of persons in all three branches of the federal government to receive honoraria for making speeches or publishing articles. Although the Court upheld the constitutional challenge filed on behalf of "rank-and-file" civil servants in the executive branch, it offered three reasons for not also invalidating the provision as to senior officials in that branch, a group that was not before the Court. First, the Court explained that the senior officials received a 25 percent salary increase that was intended in part to offset the financial loss that the honoraria ban might cause. *Id.* at 1018-19. Second, it concluded that different justifications might support applying the ban to senior officials than to rank-and-file members. *Id.* at 1019. Finally, it concluded that relief could not be afforded in the manner ordered by the Court of Appeals without "tampering with the text of the statute[.]" *Id.* None of these factors is present here. First, all public officers and employees are treated identically under Article XXVIII. None received any compensating benefits. Second, if the article is unconstitutional as to civil servants, it is necessarily unconstitutional as to officers and elected officials. *See Yniguez*, 730 F.Supp. at 314; *cf. Bond*, 385 U.S. at 132-33. Finally, unlike in *National Treasury Employees Union*, here the relief we afford is simple and requires no tampering with the text of the measure.



ticle XXVIII on its face and in its entirety. Before turning directly to the article's impact on the First Amendment rights of public employees, however, we must first address two preliminary arguments that are raised by the appellants and that could affect our analysis. First, Arizonans for Official English contends that Article XXVIII interferes only with expressive conduct and not pure speech. Second, the group contends that the state may not be compelled to provide information to all members of the public in a language that they can comprehend. For the reasons that we explain below, the two arguments do not affect the ultimate conclusions that we reach.

**B.**

**Speech v. Expressive Conduct**

Arizonans for Official English argues vehemently that First Amendment scrutiny should be relaxed in this case because the decision to speak a non-English language does not implicate pure speech rights.Rather, the group suggests, "choice of language ... is a mode of conduct"--a "nonverbal expressive activity." Opening Brief at 15, 18 (emphasis added) (quoting *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2544 (1992)). Accordingly, it compares this case to those involving only "expressive conduct" or "symbolic speech." *E.g., Texas v. Johnson*, 491 U.S. 397 (1989) (burning American flag for expressive reasons); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (wearing armband for expressive reasons); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft card for expressive reasons). In such cases, the government generally has a wider latitude in regulating the conduct involved, but only when the regulation is not directed at the communicative nature of that conduct. *Johnson*, 491 U.S. at 406.

We find the analysis employed in the above cases to be inapplicable here, as we are entirely unpersuaded by the comparison between speaking languages other than Eng-

lish and burning flags.[17] Of course, speech in any language consists of the "expressive conduct" of vibrating one's vocal chords, moving one's mouth and thereby making sounds, or of putting pen to paper, or hand to keyboard. Yet the fact that such "conduct" is shaped by a language--that is, a sophisticated and complex system of understood meanings--is what makes it speech.[18] Language is by definition speech, and the regulation of any language is the regulation of speech.

A bilingual person does, of course, make an expressive choice by choosing to speak one language rather than

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17 We have no doubt, however, that even under the relatively relaxed test for expressive conduct set out in *U.S. v. O'Brien*, 391 U.S. 367 (1968), Article XXVIII would be unconstitutional. Under *O'Brien*, "a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. Article XXVIII fails at least the final prong. *See* discussion, *infra* at ss IIID(4) and IIID(6).

18 The paradoxical attempt to classify choice of language as conduct is useful, perhaps, in underscoring the weakness of the strict conduct/speech distinction. As the example of American sign-language illustrates, we describe various kinds of physical conduct -- whether the making of specific sounds or specific hand movements -- as language when they have reached a level of sophistication in grammatical structure and vocabulary to allow them to convey complex ideas with a sufficient degree of accuracy. *See Johnson*, 491 U.S. at 404 (in deciding whether particular conduct is protected by the First Amendment, asking "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it'") (*quoting Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).



another.[19] As Yniguez explained, her choice to speak Spanish with other bilingual people can signify "solidarity" or "comfortableness."[20] Nonetheless, this expressive effect does not reduce choice of language to the level of "conduct," as posited by Arizonans for Official English; instead, it exemplifies the variety of ways that one's use of language conveys meaning. For example, even within a given language, the choice of specific words or tone of voice may critically affect the message conveyed. Such variables--language, words, wording, tone of voice--are not expressive conduct, but are simply among the communicative elements of speech. Moreover, the choice to use a given language may often simply be based on a pragmatic desire to convey information to someone so that they may understand it. That is in fact the basis for the choice involved in the constitutional challenge we consider here.

The Supreme Court recognized the First Amendment status of choice of language in somewhat different circumstances when it ratified a speaker's freedom to say "fuck the draft" rather than "I strongly oppose the draft." *Cohen v. California*, 403 U.S. 15 (1971) (reversing conviction under California "offensive conduct" law). Like the proponents of Article XXVIII, the state in *Cohen* had described Cohen's choice of language as conduct equivalent to burning a draft card. *Id.* at 18 (citing *O'Brien*, *supra* ); *see also id.* at 27 (Blackmun, J., dissenting) (arguing that Cohen's phrasing "was mainly conduct and little speech"). The

19 It is important to recall, by contrast, that a monolingual person does not have the luxury of making the expressive choice to communicate in one language or another. If that person is to speak at all, it is in a single language which may not be English.

20 Conversely, the deliberate choice to speak to someone in a language that he or she does not understand may convey a strong message of exclusion.

Court unequivocally rejected the comparison, stating that Cohen's conviction rested "solely upon speech." *Id.* at 18.

Warning that the First Amendment does not, however, give people the absolute right to use any form of address in any circumstances, the Court next addressed the question of whether Cohen's conviction could potentially be upheld as a regulation of the manner of Cohen's speech. *Id.* at 19. Specifically, it framed the First Amendment issue by asking "whether California can excise ... one particularly scurrilous epithet from the public discourse." *Id.* at 23. Its answer to that question was, "No." Indeed, in justifying its conclusion, the Court echoed Yniguez's comments regarding her use of Spanish. It stated that "words are often chosen as much for their emotive as their cognitive force"-- to such an extent, in fact, that this emotive aspect "may often be the more important element of the overall message sought to be communicated." *Id.* at 26.

Under Article XXVIII, of course, the state is not singling out one word for repression, but rather entire vocabularies. Moreover, the languages of Cervantes, Proust, Tolstoy, and Lao-Tze, among others, can hardly be described as "scurrilous." In this case, therefore, the Court's admonishment that "in a society as diverse and populous as ours" the state has "no right to cleanse public debate" of unpopular words, rings even truer. *Id.* at 24-25. While Arizonans for Official English complains of the "Babel" of many languages, the Court in Cohen responds that this "verbal cacophony is ... not a sign of weakness but of strength." *Id.* at 25; *see also Alfonso v. Board of Review*, 444 A.2d 1075, 1085 (N.J.) (Wilentz, C J.dissenting) (arguing that notice should be given in the language of the claimant and stating that to do so would show that "we are strong enough to give meaning to our fundamental rights when they are possessed by non-English speaking people in our midst"), *cert. denied*, 459 U.S. 806 (1982).



As we have noted, it is frequently the need to convey information to members of the public that dictates the decision to speak in a different tongue. If all state and local officials and employees are prohibited from doing so, Arizonans who do not speak English will be unable to receive much essential information concerning their daily needs and lives. To call a prohibition that precludes the conveying of information to thousands of Arizonans in a language they can comprehend a mere regulation of "mode of expression" is to miss entirely the basic point of First Amendment protections.[21]

In sum, we most emphatically reject the suggestion that the decision to speak in a language other than English does not implicate pure speech concerns, but is instead akin to expressive conduct. Speech in any language is still speech, and the decision to speak in another language is a decision involving speech alone.

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21 We would only add that to ignore the substance of speech and to look solely to form when analyzing the impact of a prohibition on speech is to be wholly mechanical and artificial. That approach to constitutional analysis ill serves the purpose of the Bill of Rights and denigrates the judicial function. When the effect of banning a form of speech is to prevent receipt of the message by the intended audience, it cannot seriously be argued that the ban is innocuous because it applies only to the mode of speech. Moreover, notwithstanding Chief Judge Wallace's assertion, see Wallace, concurring in dissent at 12781, the Court has found modes of speech to be protected by the First Amendment. For example, the Court has repeatedly protected a speaker's right to deliver his message anonymously. *McIntrye v. Ohio Elections Com'n*, 115 S.Ct. 1511 (1995); *Talley v. California*, 362 U.S. 60 (1960). In these cases, the Court did not hold that the speaker could not deliver an identical message without anonymity, rather that the speaker might not do so. Here, prohibiting delivery of all messages in languages other than English ensures that many Arizonans will not receive certain messages at all.

## C.

### Affirmative Versus Negative Rights

Arizonans for Official English next contends, incorrectly, that Yniguez seeks an affirmative right to have govern ment operations conducted in foreign tongues. Because the organization misconceives Yniguez's argument, it relies on a series of cases in which non-English-speaking plaintiffs have unsuccessfully tried to require the government to provide them with services in their own language. *See Guadalupe Org. Inc.*, 587 F.2d at 1024 (no right to bilingual education); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir.1973) (no right to unemployment notices in Spanish); *Toure v. United States*, 24 F.3d 444 (2d Cir.1994) (no right to notice of administrafive seizure in French); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir.1983) (no right to Social Security notices and services in Spanish), *cert. denied*, 466 U.S. 929 (1984); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir,.1975) (no right to civil service exam in Spanish). These cases, however, hold only that (at least under the circumstances there involved) non-English speakers have no affirmative right to compel state government to provide information in a language that they can comprehend. The cases are inapplicable here.

In the case before us, there is no claim of an affirmative right to compel the state to provide multilingual information, but instead only a claim of a negative right: that the state cannot, consistent with the First Amendment, gag the employees currently providing members of the public with information and thereby effectively preclude large numbers of persons from receiving information that they have previously received. *Cf. Union Free School*



*Dist. No. 26*, 457 U.S. at 866-67.[22] Such a claim falls squarely within the confines of traditional free speech doctrine, and is in no way dependent on a finding of an affirmative duty on the part of the state.

The clearest example of the distinction between affirmative and negative rights may be seen in the case of a state legislator who may seek office and be elected in part because of his ability to speak with his constituents in their native languages. No one could order such an official to speak Spanish or Navajo. Neither, however, can the state preclude him or his staff from transmitting information regarding official state business to persons resident in his district in whatever language he deems to be in the best interest of those he was elected to serve.

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22 The distinction between affirmative and negative rights, though its legitimacy has been much disputed in academic circles, continues to find favor with the Supreme Court. *See, e.g., DeShaney v. Winnebago County Dep't of Social Servs*, 489 U.S. 189, 196-97 (1989) (rejecting the view that the Constitution imposes "affirmative obligations" on the state). In some instances, the line separating the affirmative from the negative is hard to draw -- even though it may be critical to the outcome of a case. *Compare Union Free School Dist. No. 26*, 457 U.S. at 855-56 (asking "whether the First Amendment imposes limitations [upon the school board's power] to remove library books from high school and junior high school libraries")(plurality opinion)(emphasis added), and *id.* at 878 (stating that the right at issue does not involve "any affirmative obligation to provide students with information or ideas")(Blackmun, J., concurring)(emphasis added), with *id.* at 886 (complaining that "the plurality suggests that there is a new First Amendment 'entitlement' to have access to particular books in a school library")(Burger, C.J., dissenting) (emphasis added). In the present case, however, there can be no doubt that Article XXVIII represents a prohibition on non-English speech, not simply a failure to provide it.

The cases relied on by the amendment's sponsors are inapplicable not only because they involve claims of affirmative rights but because they neither consider nor discuss the First Amendment. Rather, in all those cases the plaintiffs sought to justify the alleged right to compel the state to provide bilingual information and services by reference to equal protection and due process principles. Because mandating compliance with the plaintiffs' requests would have placed an affirmative burden on state and local agencies to supply a bilingual speaker--creating affirmative costs--the courts rejected the claims. *See, e.g., Frontera*, 522 F.2d at 1219 (emphasizing that the cost of bilingual civil service examinations "would ultimately be saddled upon the harried taxpayers of Cleveland"); *Toure*, 24 F.3d at 446 (requirement of notice in language of plaintiff would "impose a patently unreasonable burden upon the government").

Accordingly, the argument of the amendment's sponsor is irrelevant to the right we consider in this case. For while the state may not be under any obligation to provide multilingual services and information, it is an entirely different matter when it deliberately sets out to prohibit the languages customarily employed by public employees. In this connection, we note that here, unlike in the affirmative right cases, there is no contention that "harried taxpayers" will be "saddled" with additional costs, or that the state will be subjected to a "patently unreasonable burden." All that the state must do to comply with the Constitution in this case is to refrain from terminating normal and cost-free services for reasons that are invidious, discriminatory, or, at the very least, wholly insufficient.



## D.

## Public Employee Speech

### 1.

### General Principles

If this case involved a statewide ban on all uses of lanages other than English within the geographical jurisdiction of the state of Arizona, the constitutional outcome would be clear. A state cannot simply prohibit all persons within its borders from speaking in the tongue of their choice. Such a restriction on private speech obviously could not stand. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). However, Article XXVIII's restraint on speech is of more limited scope. Its ban is restricted to speech by persons performing services for the government. Thus, we must look beyond first principles of First Amendment doctrine and consider the question of what limitations may constitutionally be placed on the speech of government servants.

For nearly half-a-century, it has been axiomatic in constitutional law that government employees do not simply forfeit their First Amendment rights upon entering the public workplace. In 1972, the Supreme Court elaborated on this principle in upholding a constitutional challenge to a state college's refusal to renew the contract of a teacher who had criticized its policies. *See Perry v. Sindermann*, 408 U.S. 593, 597. "For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech.... [M]ost often, we have applied this principle to denials of public employment." *Id.* Only four years ago, the Supreme

Court in *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2736 (1990), reaffirmed this principle and reiterated these same words from Perry in upholding a First Amendment challenge to a governmental infringement on public employee rights. Thus, the Supreme Court has made it abundantly clear that prohibitions on speech may not be justified by the simple assertion that the government is the employee's employer.

**2.**

**Regulation of Traditional Types of Public Employee Speech**

Arizonans for Official English acknowledges that public employee speech is entitled to First Amendment protection. The group then correctly points out that the Supreme Court has held in a series of cases that the government traditionally has a freer hand in regulating the speech of its employees than it does in regulating the speech of private citizens. *See Waters v. Churchill*, 114 S.Ct. 1878, 1886 (1994) (plurality opinion); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 147 (1983); *Pickering v. Board of Educ. of Township High School Dist.*, 391 U.S. 563, 568 (1968). As the Court in *Waters* explained, "even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." 114 S.Ct. at 1886. Notably, the Waters Court stated that the *Cohen* rule mandating toleration of choice of language would be inapplicable to the government workplace and made it clear that, in fact, a government employer might appropriately bar its employees from using rude or vulgar language in the workplace. *Id.*; *see also Martin v. Parrish*, 805 F.2d 583, 584 (5th Cir.1986).

Elaborating on concepts previously expressed in *Pickering* and *Connick*, the *Waters* Court examined the reasons that less stringent scrutiny is ordinarily justified in reviewing restrictions on public employee speech. The Court



found, in particular, that "the extra power the government has in this area comes from the nature of the government's mission as employer," *id.* at 1887, and it ultimately concluded that:

> [t]he key to First Amendment analysis of government employment decisions ... is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

*Id.* at 1888 (emphases added); *see also Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 146-47; *Rankin*, 483 U.S. at 388.

Thus, the Court has made it clear that it is the government's interest in performing its functions efficiently and effectively that underlies its right to exercise greater control over the speech of public employees. Even before *Waters*, the Court's concern for efficiency and effectiveness led it to conclude that when a public employee speaks "as an employee upon matters only of personal interest," then, "absent the most unusual circumstances," the challenged speech restriction will be upheld. *Connick*, 461 U.S. at 147; *Rankin*, 483 U.S. at 385 n. 13. Concerned that "government offices could not function if every employment decision became a constitutional matter," the Court ruled that mere "employee grievances," (*Connick*, 461 U.S. at 146)-- involving speech, for example, about "internal working conditions, affecting only the speaker and coworkers," (*O'Connor v. Steeves*, 994 F.2d 905, 914 (1st Cir.1993))--should rarely be protected by the federal courts.

The *Waters/Pickering* cases also establish, however, that public employee speech deserves far greater protection when the employee is speaking not simply upon employment matters of personal or internal interest but instead "as a citizen upon matters of public concern". *Connick*, 461 U.S. at 147. In evaluating restrictions on speech of "public concern," the governmental interest in efficiency and effectiveness is important but not necessarily determinative. In such cases, the content of the speech requires that the government's concern with efficiency and effectiveness be balanced against the public employee's first amendment interest in speaking as emphasized in *Perry* and *Rutan*. *See Waters*, 114 S.Ct. at 1887; *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir.1989). As the Court said in *Waters*, "a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations, the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." 114 S.Ct. at 1887.

**3.**

**The Interests Favoring Protection of the Prohibited Speech**

Here the speech does not fit easily into any of the categories previously established in the case law. It is clear that the speech at issue cannot be dismissed as merely speech involving "employee grievances" or "internal working conditions"-- speech that is ordinarily of little concern to the general public. Nor is it precisely the same as the speech generally denominated in past cases as "speech on matters of public concern," in part because here the employee is not simply commenting on a public



issue but in speaking is actually performing his official duties.[23]

This case does not, however, require us to attempt to resolve any broad, general questions regarding the scope of government's authority to regulate speech that occurs as part of an employee's official duties. In many instances, the governmental interest in regulation will be at its height in such cases. For example, the government would have an indisputable right to prohibit its employees from using profanity or abusive language while conducting official business. *See Waters*, 114 S.Ct. at 1886 (noting that government might prohibit its employees "from being 'rude to customers'") (citation omitted). Similarly, the government would ordinarily have the authority to determine the tasks that it asks its employees to perform and to dictate the content of the messages that it wishes its employees to communicate to the public. On the other hand, there are few First Amendment precedents in this area, and in at least one case involving a school teacher, we employed a traditional balancing test. *See, e.g., Nicholson v. Board of Educ.*, 682 F.2d 858, 865 (9th Cir.1982) (applying *Picker-*

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23 The dissent's statement that the speech in this case cannot be easily pigeonholed into one of the traditional legal categories is fully consistent with our analysis. However, unlike the dissent, we conclude, for the reasons discussed *infra* at [App. 41a], that the speech prohibited by Article XXVIII of the Arizona Constitution more closely resembles public concern than private concern speech. Chief Judge Wallace's attempt to distinguish the speech of public employees who communicate information relating to governmental functions in languages other than English from off-the-job-speech in which public employees communicate their personal opinions relating to governmental matters only serves to prove our point conclusively. If the latter, as Judge Wallace correctly says constitutes speech of public concern, see Wallace, concurring in dissent at [App. 85a], so, *a fortiori*, must the former.

*ing* balancing test to job performance speech). For present purposes, it is enough to note that the fact that the speech occurs as a part of the performance of the employee's job functions affects the nature of our analysis but does not necessarily determine its outcome. The context in which the speech occurs must be weighed along with the other relevant factors when we balance the conflicting interests. Here, the context actually militates in favor of protecting the speech involved.[24]

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24 The Court's statements concerning the state's authority to make content-based distinctions when it is the speaker are not to the contrary. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 115 S.Ct. 2510 (1995); *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759 (1991). In both cases, the Court granted the government broad, but not unlimited, power to regulate government-subsidized speech of private parties. *Rosenberger* involved government subsidization of speech by private parties pursuing their own goals, *Rust* government subsidization of speech by private parties carrying out a government program. Neither *Rosenberger* nor *Rust* concerned the authority of the state to penalize the speech of its public employees, let alone to adopt a general prohibitory rule of sweeping applicability regarding such speech. We do not believe that isolated statements in these cases were meant to rewrite the Court's public employee speech doctrine. Nor do we believe that words used in cases dealing with wholly different issues should be wrenched from their context and applied mechanically to entirely different circumstances. While *Rosenberger* is of very recent origin, *Rust* has been with us for over four years. *Rust* has been cited more than 50 times by circuit courts, yet not once has it been applied in the context of a restriction on the speech of public employees. *Rust* is simply irrelevant here. In any event, we note that both cases demonstrate there are limitations on the restrictions that the state may impose. It is rare that governmental power is absolute, and constitutional limitations are wholly inapplicable. While government may certainly regulate or control speech when it is the speaker, it does not have unlimited power to regulate such speech; here, as elsewhere, it must act within constitutional constraints. The government could not, for example, force all public employees to wear pro-life lapel pins or deliver a pro-life message whenever in the performance of their work they communicate with members ofthe public, any more than it could require delivery of a pro-choice message under similar circumstances. To say that in most circumstances the government may regulate content by compelling or prohibiting on-the-job delivery of a particular message is a truism. However, pronouncing that truism does not resolve the question before us. It merely helps us reach the central issue of this case: Is the particular regulation – here, one that drastically affects not only public employees but also countless Arizonans who need desperately to communicate with their government – constitutional?



In deciding whether to afford constitutional protection to prohibited employee speech, we must consider both the general interest of the public servant in speaking freely, as described in *Perry* and *Rutan*, and the importance to the public of the speech involved. *See Connick*, 461 U.S. at 149 (considering the public's interest in the speech in determining whether to protect it); *Pickering*, 391 U.S. at 571-72 (same). The employee speech banned by Article XXVIII is unquestionably of public import. It pertains to the provision of governmental services and information. Unless that speech is delivered in a form that the intended recipients can comprehend, they are likely to be deprived of much needed data as well as of substantial public and private benefits. The speech at issue is speech that members of the public desire to hear. Indeed, it is most often the recipient, rather than the public employee, who initiates the dialogue in a language other than English. *See Connick*, 461 U.S. at 149 (judging whether speech is of "public concern" by assessing whether it would convey information of use to the public); *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076, 1079-80 (4th Cir.1987) (quoting *Berger v. Battaglia*, 779 F.2d 992, 998-99 (4th Cir.1985) (citations omitted), *cert. denied*, 487 U.S. 1206

(1988) (stating that speech is of "public concern" based on whether the public wants to hear it)).

The practical effects of Article XXVIII's de facto bar on communications by or with government employees are numerous and varied. For example, monolingual Spanish-speaking residents of Arizona cannot, consistent with the article, communicate effectively with employees of a state or local housing office about a landlord's wrongful retention of a rental deposit, nor can they learn from clerks of the state court about how and where to file small claims court complaints.[25] They cannot obtain information regarding a variety of state and local social services, or adequately inform the service-givers that the governmental employees involved are not performing their duties properly or that the government itself is not operating effectively or honestly. Those with a limited command of English will face commensurate difficulties in obtaining or providing such information. *Cf. Garcia v. Spun Steak*, 998 F.2d 1480, 1488 (9th Cir.)(effect of English-only employment rule varies from workplace to workplace; in some circumstances; it effectively may deny employees with limited proficiency in English the capacity to communicate on the job, and may therefore be invalid as applied to them), *reh'g en banc denied*, 13 F.3d 296 (1993), *cert. denied*, 114 S.Ct. 2726 (1994). Moreover, as we suggested earlier, the restrictions that Article XXVIII imposes severely limit the ability of state legislators to communicate

25 We note that in *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir.1988), *vacated as moot*, 490 U.S. 1016 (1989), while striking down an English-only rule applicable to the private speech of Los Angeles Municipal Courts employees on the ground that it violated Title VII, we explained that serious constitutional questions would arise if such a rule were to forbid communication in Spanish with the non-English-speaking public. *Id.* at 1044 n. 19.



with their constituents concerning official matters. For example, the provision would preclude a legislative committee from convening on a reservation and questioning a tribal leader in his native language concerning the problems of his community. A state senator of Navajo extraction would be precluded from inquiring directly of his Navajo-speaking constituents regarding problems they sought to bring to his attention. So would his staff. The legislative fact-finding function would, in short, be directly affected.

Because Article XXVIII bars or significantly restricts communications by and with government officials and employees, it significantly interferes with the ability of the non-English-speaking populace of Arizona "'to receive information and ideas.'" *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (quoting *Kleindienst v. Mandel*, 408 U.S. .753, 762-63 (1972)). As the Court explained in *Virginia Citizens*, "freedom of speech 'necessarily protects the right to receive.'" *Id.*; *see also Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 866-68 (1992); *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 307-08 (1965) (Brennan, J., concurring); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating statute prohibiting teaching of foreign languages in part because it interfered "with the opportunities of pupils to acquire knowledge"). Although *Virginia Citizens* is not controlling here because it involved a restriction on the speech of a private

entity that willingly provided information to the public,[26] the "right to receive" articulated in *Virginia Citizens* and related cases is clearly relevant in public employee speech cases. Any doubt concerning this point was removed in the *National Treasury Employees Union* case. There, the Court expressly invoked *Virginia Citizens* in striking down a public employee speech restriction. The large-scale disincentive to government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757, 96 S.Ct. 1817, 1822-1823, 48 L.Ed.2d 346 (1976). We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne. *National Treasury Employees Union*, 115 S.Ct. at 1015 (footnote omitted). Thus, *National Treasury Employees Union* makes it clear that public employee speech doctrine weighs heavily the public's "right to receive information and ideas" by affording First Amendment protection to speech that the public has an interest in receiving. *See Connick*, 461 U.S. at 149; *Pickering*, 391 U.S. at 571-72; *Piver*, 835 F.2d at 1079-80. In applying these principles, we note that the speech at issue here, mundane though it may be, is of far more direct significance to the public than was the speech referred to in *National Treasury Employees Union.*

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26 In *Virginia Citizens*, the Court struck down a statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs, holding that the statute violated the First Amendment. Specifically, it found that the government's suppression of the flow of prescription drug price information violated consumers' right to receive the information. *Id.* at 770.



Article XXVIII obstructs the free flow of information and adversely affects the rights of many private persons by requiring the incomprehensible to replace the intelligible. Under its provisions, bilingual public employees will be aware that in many instances the only speech they may lawfully offer may be of no value. The article effectively requires that these employees remain mute before members of the non-English speaking public who seek their assistance. At such moments of awkward silence between government employees and those they serve, it will be strikingly clear to all concerned that vital speech that individuals desire both to provide and to hear has been stifled by the state.

**4.**

**The Absence of Any State Interest In Efficiency and Effectiveness**

In light of the interests of both public employees and members of the public in the prohibited speech, a decision as to the constitutionality of Article XXVIII's restrictions involves at a minimum a weighing and balancing process similar to that conducted in the more traditional cases involving public employee speech of "public concern".[27] Here, the efficiency and effectiveness considerations that constitute the fundamental governmental interest in the usual "public concern" cases-and that provide the justification against which the employee's First Amendment interests must be weighed-are wholly absent. Indeed, as the parties acknowledged in the stipulation of uncontested facts, Arizona's interest in the efficiency and effectiveness of its workforce runs directly counter to Article XXVIII's restriction on public employee speech. *See* note 4, *supra*.

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27 The alternative is, of course, to apply the strict scrutiny test. *See Rutan*, 110 S. Ct. 2735 & n.4. See also discussion *infra* at 12737-39.

Specifically, the facts of this case unequivocally establish that Yniguez's use of Spanish in the course of her official duties contributed to the efficient and effective administration of the State. *See* Statement of Stipulated Facts at 5-6. More generally, the facts of this case, as well as elementary reason, tell us that government offices are more efficient and effective when state and local employees are permitted to communicate in languages other than English with consumers of government services who are not proficient in that language. *Id.* (stating that use of non-English languages promotes the "efficient administration of the State"); *Cota v. Tucson Police Dept.*, 783 F. Supp. 458, 462 (D.Ariz.1992) (emphasizing that "the availability of Spanish-speaking personnel is necessary for effective performance of [the Tucson Police Department's] mission").

Additionally, as we explained earlier, if the purpose of Article XXVIII were to promote efficiency, it would not impose a total ban but would provide that languages other than English may be used in government business only when they facilitate such business and not when they hinder it. Article XXVIII plainly does not make this distinction. *See*, supra, at 12711-13.

On this point, we note that Arizonans for Official English's assertion that government inefficiency and "chaos" will result from Article XXVIII's invalidation is not only directly contrary to the stipulated facts but is predicated upon a wholly erroneous assumption as to the nature of Yniguez's claim. The group contends that appellees seek the right to speak another language at will and regardless of whether the intended recipient of the speech primarily speaks that language or is even able to comprehend it. However, such a "right" would be of a far different order than the right at issue here. As the facts show, Yniguez spoke Spanish with Spanish-speaking claimants and English with English-speaking claimants. She does not



claim any right to "choose" to speak Spanish with claimants who would not understand her, nor would this or any other court uphold such a right. Accordingly, in the interests of clarity, we emphasize that by ruling that the state cannot unreasonably limit the use of non-English languages, we do not imply that the state is therefore forced to allow inappropriate or burdensome language uses. In short, we do not suggest that a public employee has a "right" to speak in another language when to do so would hinder job performance. *Cf. Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir.1987) (Title VII not violated by radio station's firing of announcer who refuses to follow programming format and insists on speaking in Spanish). We merely consider here the lawfulness of speech in languages other than English that furthers the state's traditional interest in efficiency and effectiveness.

**5.**

**The Propriety of Considering State Justifications Other Than Efficiency and Effectiveness**

Because the speech at issue here does not adversely affect the state's interest in efficiency and effectiveness, and because the *Waters/Pickering* line of cases limits consideration of the governmental interest to these concerns, were we to apply the traditional *Waters/Pickering* balancing test, Arizonans for Official English would lose by default. There would be nothing on the non-free speech side of the scale. There have, however, been a number of other cases in which the Court (though sometimes giving some weight to efficiency and effectiveness concerns) has considered primarily the government's argument that a broader set of justifications supports a particular restriction on the First Amendment rights of public employees.

Most of the cases in which the government has relied on justifications other than efficiency and effectiveness have involved patronage practices, although some have involved restrictions on public employees' political activi-

ties. *See, e.g., Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2735-37 & n.4 (1990) (citing, *inter alia*, interest in preventing excessive political fragmentation and strengthening party system); *Elrod v. Burns*, 427 U.S. 347, 364-69 (1976) (citing, inter alia, interest in preserving the democratic process); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 565 (1973) (citing, *inter alia*, interest in preventing development of a powerful and corrupt political machine). In those cases, the government has relied on the broader concerns that "the government might have in the structure and functioning of society as a whole." *Rutan*, 110 S.Ct. at 2735 n.4. In other words, the concerns on which the government has relied do not relate to ensuring an efficient workplace but instead involve more general societal interests. In such cases, there is no substantial nexus between the alleged governmental interest and job performance.

In a recent Supreme Court case in which the government sought to justify a limitation on public employee First Amendment rights on the basis of broad governmental interests rather than on traditional efficiency and effectiveness concerns, the majority applied a strict scrutiny test and rejected the challenged governmental practices. The majority concluded that because the government's interests in the regulations were not "employment-related," there was no reason to relax the strict scrutiny ordinarily applied to restrictions on speech. *Rutan* 110 S.Ct. at 2735 n.4. By contrast, the dissenters applied a more permissive balancing test, asking: "can the governmental advantages of this employment practice reasonably be deemed to outweigh its 'coercive' effects?" Compare *Rutan*, 110 S.Ct at 2735-36 & n.4 with *id.* at 2749-52 & n.3 (Scalia, J., dissenting). The dissenters adopted the premise that broader governmental interests were due no less deference than the gov-



ernmental interest in efficiency and effectiveness.[28] Accordingly, the dissenters' approach essentially mimicked the *Waters/Pickering* balancing test; it simply broadened the scope of that test to account for interests other than efficiency and effectiveness.

In an even more recent case, the Court invalidated a restriction on public employee speech without discussing the question of the applicable test, although it employed a balancing approach. *See United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1015-1018 (1995). In doing so, the Court did not even mention *Rutan*. Nor did it refer to or identify a specific level of scrutiny to be applied. Instead, it deemed it sufficient to evaluate the particular burdens imposed by the statute in light of the particular interests affected. Rather than fixing on superficially precise legal labels or formulae that are easily manipulated by sophisticated lawyers and judges, the Court conducted a thorough and judicious examination of the practical impact of the legislation involved, both positive and negative, and its effect on constitutionally protected interests. It then carefully weighed and balanced the various factors and reached its conclusion in a reasoned and measured manner. In doing so, it ably performed the quintessential function of judicial decision-making: the exercise of judgment.

The Court's approach in *National Treasury Employees Union* is consistent with the method of analysis we under-

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28 The dissenters concluded that it is wholly irrelevant whether the restrictions at issue are justified on the basis of the "employer" interests of efficiency and effectiveness, or broader interests. *See id.* at 2751 n.3 In their view, there is "no reason in policy or principle" why the government should not be free to further even its broader interests through appropriate restrictions on employee speech. *Id.*

take. In any event, we need not decide what level of scrutiny or what approach to balancing is applicable here. Whether we apply strict scrutiny as suggested by *Rutan*, whether we use a form of balancing test similar to that advocated by the *Rutan* dissenters and modelled on the approach traditionally employed in the *Waters/Pickering* line of cases, or whether we follow the course chosen by the Court in *National Treasury Employees Union*, the result is the same: The restrictions on free speech are not justified by the alleged state interests.

**6.**

**Evaluating the Alleged State Justifications**

Arizonans for Official English claims, as it and others did when the initiative was on the ballot, that Article XXVIII promotes significant state interests. The organization enumerates these interests as: protecting democracy by encouraging "unity and political stability"; encouraging a common language; and protecting public confidence.

We note at the outset that the sweeping nature of Article XXVIII's restriction on public employee speech weighs significantly in our evaluation of the state's alleged interests. In *National Treasury Employees Union*, the Court explained that when the government seeks to defend a "wholesale deterrent to a broad category of expression by a massive number of potential speakers," 115 S.Ct. at 1013, its burden is heavier than when it attempts to defend an isolated disciplinary action. *Id.* Thus, we must examine the state's asserted justifications with particular care.

There is no basis in the record to support the proponents' assertion that any of the broad societal interests on which they rely are served by the provisions of Article XXVIII. We also note that the article itself contains no statement of findings that would suggest that it would serve the interests asserted by the appellants. The absence of any evidence to this effect is of particular significance



given that the deference normally accorded legislative findings does not apply with the same force when "First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 839, 841 (1978). It is equally significant for a second reason-Article XXVIII is a ballot initiative and thus was subjected to neither extensive hearings nor considered legislative analysis before passage. *Cf. United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. at 565-567 (noting the extensive legislative findings that supported the Hatch Act).

In plain fact, Arizonans for Official English offer us nothing more than "assertion and conjecture to supports its claim" that Article XXVIII's restrictions on speech would serve the alleged state interests. *Landmark*, 435 U.S. at 841; *National Treasury Employees Union*, 115 S.Ct. at 1017 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. ___, 114 S.Ct. 2445, 2450 (1994)). Accordingly, the appellants have not demonstrated that the benefits to be obtained outweigh the burdens imposed on First Amendment rights, particularly given the all-encompassing scope of the restriction they seek to defend. *See National Treasury Employees Union*, 115 S.Ct. at 1014 (explaining that the government's "burden is greater" in such cases).

We also reject the justifications for even more basic reasons. Our conclusions are influenced primarily by two Supreme Court cases from the 1920s in which nearly identical justifications were asserted in support of laws restricting language rights. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927). *Meyer* involved a Nebraska statute that prohibited the teaching of non-English languages to children under the eighth grade level; *Tokushige*, similarly, involved a Hawaii statute that singled out "foreign language schools," such as those in which Japanese was taught, for stringent government control.

In defending the statute at issue in *Meyer*, the state of Nebraska explained that "[t]he object of the legislation ... [is] to create an enlightened American citizenship in sympathy with the principles and ideals of this country." 262 U.S. at 393; *see also id.* at 398 (asserting that purpose of law was to prevent children from having "inculcate[d] in them the ideas and sentiments foreign to the best interests of this country"); *id.* at 390 (noting that law was designed "to promote civic development," and inhibit the acquisition of "foreign ... ideals"). More recently, the Court explicitly characterized the language restriction in *Meyer* as designed "to promote civic cohesiveness by encouraging the learning of English." *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968). Despite these worthy goals, the Court ruled that the repressive means adopted to further them were "arbitrary" and invalid. *Meyer*, 262 U.S. at 403.

Similarly, the provision at issue in *Tokushige* had the specific purpose of regulating language instruction "in order that the Americanism of the students may be promoted." 273 U.S. at 293. As in *Meyer*, the *Tokushige* Court recognized the validity of the interests asserted in defense of the statute. 273 U.S. at 299. Nonetheless, citing *Meyer*'s invalidation of the Nebraska law, it found that the statute's promotion of these interests was insufficient to justify infringing on the constitutionally protected right to educate one's children to become proficient in one's mother tongue.[29]

29 The fact that the Supreme Court, deciding these cases in the 1920s, struck down the language restrictions in *Meyer* and *Tokushige* as violative of due process does not lessen their relevance. Substantive due process was the doctrine of choice for the protection of fundamental rights during the first part of this century, although it has now largely been replaced by other constitutional doctrines. See, e.g., *Halter v. Nebraska*, 205 U.S. 34, 42 (1907) (similarly framing free speech claim in terms of property rights). It should therefore be clear that the Court's formal labeling of the right as falling under the rubric of substantive due process does not control our consideration of it-and, in fact, the Court subsequently explicitly recharacterized *Meyer* as protecting First Amendment freedoms. *See Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *see also Epperson*, 393 U.S. at 105-06 (First Amendment case considering *Meyer* as relevant but noting that it "was decided before the Court expressly applied the specific prohibitions of the First Amendment to the States"); Yassky, Eras of the First Amendment, 91 Col. L. Rev. 1699, 1733 (1991) (describing *Meyer* as First Amendment case); Tribe, American Constitutional Law 1319-20 (2d ed. 1988) (noting that Justice McReynolds wrote *Meyer* "[u]sing the tools of his time," but that it has been reinterpreted as embodying First Amendment principles).



*Meyer* and *Tokushige* also demonstrate the weakness of the second justification for Article XXVIII proffered by Arizonans for Official English: that of encouraging a common language. In *Meyer*, the statute reflected the belief that "the English language should be and become the mother tongue of all children reared in this state." 262 U.S. at 398. The statute in *Tokushige* would have similarly inhibited the spread of the Japanese language, presumably in favor of English. 273 U.S. at 298. Although there is probably no more effective way of encouraging the uniform use of English than to ensure that children grow up speaking it,[30] both statutes were struck down on the ground that these interests were insufficient to warrant such restrictions on the use of foreign languages.

Like the Court in *Meyer* and *Tokushige*, we recognize the importance of (1) promoting democracy and national unity and (2) encouraging a common language as a means

30 The dissent in *Bartels v. Iowa*, 262 U.S. 404 (1923), which applied equally to *Meyer*, strongly emphasized this point. 262 U.S. at 412. The majority, however, remained unpersuaded that these concerns outweighed the fundamental rights at issue.

of encouraging such unity. *See Guadalupe Organization, Inc., supra.*[31] The two primary justifications relied on by the article's proponents are indeed closely linked. We cannot agree, however, that Article XXVIII is in any way a fair, effective, or appropriate means of promoting those interests, or that even under a more deferential analysis its severely flawed effort to advance those goals outweighs its substantial adverse effect on first amendment rights. As we have learned time and again in our history, the state cannot achieve unity by prescribing orthodoxy. *See West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943); *Meyer*, 262 U.S. 390, 392 (argument of plaintiff) (forced "Americanization" violates American tradition of liberty and toleration). Notwithstanding this lesson, the provision at issue here "promotes" English only by means of proscribing other languages and is, thus, wholly coercive. Moreover,

31 The dissent treats *Guadalupe Organization*, a case that does not even discuss the First Amendment and which focused on the right to be instructed in a foreign language about a foreign culture, as the touchstone for deciding this First Amendment challenge. We agree with *Guadalupe Organization* to the extent that it sets forth the advantages that accrue from encouraging those living in this nation to learn English and to share in our use of a common language. At the same time we recognize that cultural diversity and tolerance of differences are among our nation's greatest strengths, as is our unwillingness to impose uniformity or orthodoxy by fiat. This court's position regarding linguistic and cultural diversity and the constitutionally-permissible means for promotion of our growth as a unified nation are the ones expressed in this majority opinion and the concurrence of Judge Brunetti whose separate statements on this point we fully endorse. We disapprove, however, the part of *Guadalupe Organization* on which the dissent relies and which it quotes at pages 12779-81. By doing so, we do not intend to unsettle the holding of our earlier decision; the question resolved in *Guadalupe Organization* is not before us, and we do not consider the part of the opinion we disapprove essential to the conclusion the *Guadalupe Organization* court reached.



the goals of protecting democracy and encouraging unity and stability are at most indirectly related to the repressive means selected to achieve them. Next, the measure inhibits rather than advances the state's interest in the efficient and effective performance of its duties. Finally, the direct effect of the provision is not only to restrict the rights of all state and local government servants in Arizona, but also to severely impair the free speech interests of a portion of the populace they serve.

We should add that we are entirely unmoved by the third justification - that allowing government employees to speak languages other than English when serving the public would undermine public confidence and lead to "disillusionment and concern." To begin with, it is clear that the non-English speaking public of Arizona would feel even greater disillusionment and concern if their communications with public employees and, effectively, their access to many government services, were to be barred by Article XXVIII. Moreover, numerous cases support the notion that the interest in avoiding public hostility does not justify infringements upon constitutional rights. *See, e.g., Buchanan v. Worley*, 245 U.S. 60, 81 (1917) (possibility of race conflict does not justify housing segregation); *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984) (society's racial animus not legitimate factor to consider in awarding custody of child). In short, the "concern" that some members of the Arizona public may feel over the use of non-English languages provides no basis for prohibiting their use no matter the degree of scrutiny we apply.

Here, the full costs of banning the dissemination of critical information to non-English speaking Arizonans cannot readily be calculated. There would undoubtedly be severe adverse consequences which even the sponsors of Article XXVIII neither foresaw nor intended. The range of potential injuries to the public is vast. Much of the information about essential governmental services that, but for

the initiative, would be communicated in a manner that non-English speaking Arizonans could comprehend may not be susceptible to timely transmission by other means. By comparison, the benefits that the initiative purports to offer are minimal, especially in light of the state's concession that its interests in "efficiency" and "effectiveness" are not served by the Article. Thus, under a balancing test, whether identified as a *Waters/Pickering* type of test, a test modelled after that standard, as employed by the dissenters in *Rutan*, or the *National Treasury Employees Union* approach to balancing, Article XXVIII must be held unconstitutional. *A fortiori*, the article could not survive a traditional strict scrutiny test. We reach our conclusions only after giving full consideration to the governmental interest in controlling the content and manner of the speech of its employees in the performance of their work assignments. Here, however, that interest, when balanced against the considerations we have examined, cannot outweigh the free speech interests impaired by Article XXVIII.

**E.**

**Conclusion**

To conclude, Article XXVIII is not a valid regulation of the speech of public employees and is unconstitutionally overbroad. By prohibiting public employees from using non-English languages in performing their duties, the article unduly burdens their speech rights as well as the speech interests of a portion of the populace they serve. The article similarly burdens the First Amendment rights of state and local officials and officers in the executive, legislative, and judicial branches.

We note that the adverse impact of Article XXVIII's overbreadth is especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Hispanics and other national origin minorities. *Cf. Spun Steak*, 998 F.2d at 1486 (English-only rule in the workplace may disproportionately affect Hispanic employees); *see generally NAACP v. City of Richmond*, 734 F.2d 1346, 1356 (9th Cir.1984) (holding, in case involving restriction on NAACP march against racist police practices, that courts "must examine restrictions on speech with particular care when their effects fall unevenly on different ... groups in society"); Tribe, supra, at 979. Since language is a close and meaningful proxy for national origin,[32] restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment. *See, e.g., Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528 (1926) (statute prohibiting keeping of account books in any language other than English or Spanish denies equal protection of law to Chinese merchants); *Lau v. Nichols*, 414 U.S. 563, 566-69 (1974) (recognizing right under Title VI of the Civil Rights Act of 1964, 42 U.S.C. s 2000d, of non-English-speaking Chinese students to receive bilingual compensatory education, because "students who do not understand English are effectively foreclosed from any meaningful education"); *Asian American Business Group v. City of Pomona*, 716 F. Supp. 1328, 1332 (C.D.Cal.1989) (law restricting use of non-English alphabetical characters discriminates on basis of national origin); *Hernandez v. Erlenbusch*, 386 F. Supp. 752, 755-56 (D.Or.1973) (tavern's English-only rule constitutes illegal discrimination against Mexican-American patrons); Califa, Declaring English the Official Language: Prejudice Spoken Here, 24 Harv. C.R.-C.L. L. Rev. 293, 325, 328 n.225 (1989); Note, A Trait-Based Approach to National Origin Claims Under Title VII, 94 Yale L.J.



32 *Cf. Hernandez v. New York*, 111 S. Ct. 1859, 1872 (1991) (noting that in some contexts proficiency in particular languages might be "treated as a surrogate for race"); but *cf. Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir.1973); *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir.1983), *cert. denied*, 466 U.S. 929 (1984).

1164, 1165 & n.5 (1985). In light of these considerations, the equal protection ramifications of Article XXVIII's restrictive impact strongly support our holding, as well.[33]

As President Franklin D. Roosevelt once remarked, "all of our people all over the country, all except the pure-blooded Indians, are immigrants or descendants of immigrants, including those who came over on the Mayflower." N.Y. Times, Nov. 5, 1944, at 38. Many and perhaps most immigrants arrived in the United States speaking a language other than English. Nonetheless, this country has historically prided itself on welcoming immigrants with a spirit of tolerance and freedom-and it is this spirit, embodied in the Constitution, which, when it flags on occasion, courts must be vigilant to protect.

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33 We note, once again, a strong similarity between this case and *Meyer*. Because the invalidated Nebraska statute to a large extent targeted the substantial German-American community in that state (and was enacted in the wake of World War I), *Meyer* has been viewed as a precursor to modern equal protection doctrine. Tribe, supra, at 1320 n.13; *Hernandez*, 111 S.Ct. at 1873. This reading of *Meyer* is strengthened by the fact that one of the laws struck down in *Bartels v. Ohio*, 262 U.S. 404 (1923), its companion case, specifically singled out the German language for repression. *See Bartels*, 262 U.S. at 410 n.2 (statute allowed teaching of non-English languages as elementary school subjects, "provided that the German language shall not be taught"). Even Justice Holmes, who otherwise dissented from the majority opinion, agreed that that statute was unconstitutional. *Bartels*, 262 U.S. at 413 (Holmes, J., dissenting). The speech of unpopular groups, of course, often meets with hostility and repression, though it is more commonly the message that is targeted than the language in which it is communicated. Given the link between unpopular speech and unpopular groups, it is not surprising that even some of our most venerable First Amendment precedents have an (albeit implicit) equal protection component. *See, e.g., Barnette, supra* (Jehovah's Witnesses); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (black civil rights activists).



In closing, we note that tolerance of difference-whether difference in language, religion, or culture more generally-does not ultimately exact a cost. To the contrary, the diverse and multicultural character of our society is widely recognized as being among our greatest strengths. Recognizing this, we have not, except for rare repressive statutes such as those struck down in *Meyer, Bartels, Yu Cong Eng,* and *Farrington*, tried to compel immigrants to give up their native language; instead, we have encouraged them to learn English. The Arizona restriction on language provides no encouragement, however, only compulsion: as such, it is unconstitutional.

## IV.

### Nominal Damages

Finally, we must consider the question of Yniguez's right to nominal damages. The State of Arizona expressly waived its right to assert the Eleventh Amendment as a defense to the award of nominal damages. In *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978), the leading case on this issue, the Supreme Court held that plaintiffs in a s 1983 action were entitled to nominal damages for the deprivation of their due process rights even without proof of actual injury. The Court explained that:

> [c]ommon-law courts traditionally have vindicated deprivations of certain absolute rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed.

*Id.*; *see also Lokey v. Richardson*, 600 F.2d 1265, 1266 (9th Cir.1979), *cert. denied* 449 U.S. 884 (1980).

The right of free speech, like that of due process of law, must be vigorously defended. Indeed, the protection

of First Amendment rights is central to guaranteeing society's capacity for democratic self-government. *See* Meiklejohn, Free Speech and Its Relation to Self-Government (1948); *New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964). Thus, even without proof of actual injury, Yniguez is entitled to nominal damages for prevailing in an action under 42 U.S.C. s 1983 for the deprivation of First Amendment rights. *See Nakao v. Rushen*, 635 F. Supp. 1362, 1364 n.5 (N.D.Cal.1986).[34]

**V.**

**Conclusion**

We affirm the district court's judgment that Article XXVIII of the Arizona Constitution is facially overbroad and violates the First Amendment, and that the article is unconstitutional in its entirety. We reverse and remand the district court judgment insofar as it denies Yniguez an award of nominal damages.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

**APPENDIX**

**ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE**

**1. English as the Official Language; Applicability.**

Section 1.(1) The English language is the official language of the State of Arizona. (2) As the official language

34 Indeed, an award of nominal damages in recognition of society's interest in vindicating the disputed right is singularly appropriate in First Amendment overbreadth cases such as this, for a successful plaintiff in an overbreadth case has convinced the court to strike down a law that would, if left standing, chill the constitutionally protected speech of large numbers of other members of society.



of this State, the English language is the language of the ballot, the public schools and all government functions and actions. (3) (a) This Article applies to: (i) the legislative, executive and judicial branches of government, (ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities, (iii) all statutes, ordinances, rules, orders, programs and policies, (iv) all government officials and employees during the performance of government business. (b) As used in this Article, the phrase "This state and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

**2. Requiring This State to Preserve, Protect and Enhance English.**

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the state of Arizona.

**3. Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.**

Section 3.(1) Except as provided in Subsection (2): (a) This State and all political subdivisions of this State shall act in English and no other language. (b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English. (c) No governmental document shall be valid, effective or enforceable unless it is in the English language. (2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances: (a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English. (b) to

comply with other federal laws. (c) to teach a student a foreign language as a part of a required or voluntary educational curriculum. (d) to protect public health or safety. (e) to protect the rights of criminal defendants or victims of crime.

**4. Enforcement; Standing.**

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

BRUNETTI, Circuit Judge, concurring.

I agree that Article XXVIII of the Arizona Constitution is facially invalid and I join in the majority opinion. I write separately to emphasize that the article's unconstitutional effect on Arizona's elected officials would alone be sufficient reason to strike the provision down.

**I.**

As indicated in the majority opinion, the government employees affected by the article's unconstitutional limitations outnumber the elected officials affected. However, the extent of the damage caused by Article XXVIII's restrictions on elected officials is not diminished by the fact that their population is smaller than that of government employees.

Article XXVIII offends the First Amendment not merely because it attempts to regulate ordinary political speech, but because it attempts to manipulate the political process by regulating the speech of elected officials. Freedom of speech is the foundation of our democratic process, and the language restrictions of Article XXVIII stifle



informative inquiry and advocacy by elected officials. By restricting the free communication of ideas between elected officials and the people they serve, Article XXVIII threatens the very survival of our democratic society.

To begin with, Article XXVIII interferes with the ability of candidates for re-election to communicate with voters. These First Amendment protections are equally applicable to all candidates, not simply those running for re-election. However, I address specifically candidates running for re-election because Article XXVIII only affects elected officials.

A candidate must be able to communicate with voters in order for voters to make an informed decision about whether to cast their ballot for that candidate. Indeed, the Supreme Court has said: Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them. *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966). Communication between candidates and voters is at the core of all political action. The First Amendment prevents the disenfranchisement that results when candidates for re- election are disabled from communicating with any certain group.

Article XXVIII not only interferes with a voter's ability to assess candidates, but it also interferes with officials' ability to represent their constituents once they are elected. "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Id.* at 135-36. Elected representatives cannot fully serve their constituents if they are precluded from fully expressing their views to, and learning the views of, those constituents. The First Amendment precludes a successful

electoral majority from restricting political communications with a certain segment of the electorate.

In addition to interfering with voting and political representation, Article XXVIII attempts to reconfigure the political landscape. Language is at the foundation of the cultural and ethnic diversity in our democratic and political processes, and is inextricably intertwined therein. Article XXVIII attempts to impose political conformity by requiring that the same language be used for all political and governmental dialogue. See Legislative Council Arguments Favoring Proposition 106, at 26 (describing the need to "reverse the trend" of "language rivalries" by requiring discourse in English only).

It does not take much "judicial prediction or assumption[,]" *Broadrick v. Oaklahoma*, 413 U.S. 601, 612 (1973), to conclude that Article XXVIII impermissibly chills elected officials' speech. Under principles of third-party standing in the First Amendment area, Yniguez's overbreadth claim permits this panel to examine Article XXVIII's impact on elected officials. *See id.* The harm to society from such unconstitutional interference with the democratic process requires that the article be struck down as facially overbroad. Accordingly, I would hold that Article XXVIII's unconstitutional restriction on elected officials' speech is sufficient to find facial overbreadth.

**II.**

That being said, I agree with the other members of the majority that the article is also unconstitutional and facially overbroad for the independent reason that it restricts the speech of government employees, such as Yniguez. While I feel there may be some tension between the public interest in receiving Yniguez's public services in Spanish as described by the majority, and our prior cases which hold that there is no right to receive government services in a language other than English, our holding today does not conflict with those prior cases. *See,*



*e.g., Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir.1973) (no right to unemployment notice in Spanish); *Soberal-Perez v. Heckler*, 717 F.2d 36, 41-43 (2d Cir.1983) (no right to Social Security notices and services in Spanish), *cert. denied*, 466 U.S. 929 (1984).

As the majority carefully describes, we are only considering the interest of the public in receiving speech when government employees exercise their right to utter such speech, and we do not create an independently enforceable public right to receive information in another language. Our consideration of the public's interest in receiving Yniguez's speech is dictated by the *Waters/Pickering* test. Under the *Waters/Pickering* test, we must balance "'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1012 (1995) (*quoting Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968))(alteration in original). The public's interest in receiving Yniguez's speech weighs in on both sides of the test.

Speech touches a matter of public concern if the community that constitutes the speaker's audience has an interest in receiving that speech. *Cf. Connick v. Myers*, 461 U.S. 138, 148 (1983) (finding that certain speech was not a matter of public concern because "[speaker] did not seek to inform the public"); *id.* at 149 (relying on this country's "demonstrated interest" regarding the subject matter of other speech to conclude that the subject matter was one of public concern). When determining whether an employee's speech addresses a matter of public concern, we look to "the content, form, and context of a given statement, as revealed by the record as a whole." *Id.* at 147-48. In this case, the parties stipulated that Yniguez

communicates the Risk Management Division's dispositions of malpractice claims in Spanish to persons who are only able to speak in Spanish, persons whose English is not well-developed, and persons who are unable to understand the English language to comprehend the legal import of the document they are signing. Those claimants clearly have an interest in receiving information about their claims in Spanish since they would not otherwise be able to understand the information. Therefore, Yniguez's Spanish language communications touch matters of public concern.

On the efficiency side of the *Waters/Pickering* balance, the public's interest in receiving Yniguez's communications is once again an important factor. If a recipient of Yniguez's information did not have an interest in receiving the information in Spanish, it would not be efficient for Yniguez to communicate with that person in Spanish. For example, if Yniguez's audience was a mono-lingual English-speaker, undeniably it would be inefficient for her to talk to that person in Spanish. But that is not the situation here. The parties in this case stipulated that Yniguez only speaks Spanish to mono-lingual Spanish-speakers, or people whose "English language [skills] were not sufficiently well-developed to understand all of the English language expressions and ideas which [Yniguez] desired to communicate." Use of Spanish under these circumstances, as the parties stipulated, "contributes to the efficient operation of the State."

Under the facts of this case, the public interest in Yniguez's use of Spanish is a necessary consideration under the *Waters/Pickering* test. Consideration of the public's interest in receiving Yniguez's Spanish language communications is only for the purpose of establishing her right to speak, not of establishing the public's right to receive. Yniguez's Spanish-speaking audience has an interest in listening to her Spanish-language speech, and that interest helps define her right to speak in Spanish. No-



where is it implied that her audience has a right to hear her, or any other government employee, speak in Spanish.

REINHARDT, Circuit Judge, concurring specially.

Judge Kozinski's separate dissent requires separate comment. In the latest chapter of his crusade against the use of languages other than English in public, it is what Judge Kozinski does not say that is most revealing. My learned colleague, who is surely expert in these matters by now, ignores completely the constitutional interests of the numerous non-English speakers. There is nothing novel about the fact that the interests of the audience as well as of the speaker are protected by the First Amendment. Yet Judge Kozinski does not even mention, let alone discuss *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 478 (1976), or *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995), decisions that make it clear that in dealing with First Amendment questions we must consider the needs of the audience. In fact, the constitutional interests of the public are at their height when its members seek information of vital importance from the government. In the end, then, it is the interests of non-English speaking persons, often poor and uneducated, that are so compelling here.

If Judge Kozinski had his way, bilingual government clerks would not be able to advise persons who can speak only Spanish-or Chinese or Navajo-how to apply for food stamps, or aid for their children, or unemployment or disability benefits. Public employees would be prohibited from helping non-English speaking residents file complaints against those who mistreat them or who violate their rights or even from helping them secure driver's licenses or permits to open small businesses. Bilingual traf-

fic officers would not be able to give directions to nearby medical clinics or schools. Migrant farm workers who cannot speak English would find themselves cut off from almost all government assistance by an impenetrable language barrier. Recent immigrants in general, including many who fled persecution, would find their lives in their adopted land unduly harsh and bewildering. Yet, not a word of concern for the less fortunate among us finds its way into Judge Kozinski's constitutional analysis.

At the same time that Judge Kozinski callously ignores the interests of people, he stretches eagerly to place the powers of the government, in its role as speaker, beyond the reach of the Constitution. Indeed, it is the rights of the government that Judge Kozinski stresses at every opportunity. If Judge Kozinski had his druthers, public employees would be stripped of all First Amendment rights while performing their governmental functions. [FN1] There would be nothing that Government - from the tiniest municipality on up - could not compel its employees to say, no matter how racist or abhorrent, and nothing that Government could not fire its employees for saying, no matter how innocuous. His would be an Orwellian world in which Big Brother could compel its minions to say War is Peace and Peace is War, and public employees would be helpless to object. It would not matter whether government had a legitimate purpose or even whether it had a purpose at all.

FN1. I do not mean to suggest that my worthy colleague would discriminate against public employees. They would fare no worse in his regime than private employees. Judge Kozinski would strip the latter of the fruits of the basic job protection provisions that they fought for so long and so bitterly. See Judge Kozinski's dissent in *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 204 (9th Cir.1990), in which Judge Kozinski advocated upholding permanent discharges of employees on the basis of mere suspicion, notwithstanding a just-cause-for-discharge clause.



The difference between the majority's view and Judge Kozinski's is simple. The majority says that under the First Amendment there are limits to what the government can force its employees or officials to say in the course of performing their official duties while Judge Kozinski says that there are none. To me, unlimited government power in any form is a foreign notion indeed.

Judge Kozinski does Abraham Lincoln no honor by seeking to enlist his words in support of a mean-spirited, nativist measure-a measure that would create so much division and ill will and that would so severely penalize those among us who are unable to communicate in English. The end result of Judge Kozinski's legal approach would be to punish people who are not as fortunate or as well educated as he-people who are neither able to write for nor read the Wall Street Journal, and indeed would have little cause to do either.

Nor does Judge Kozinski advance his cause by disingenuously suggesting that his argument is a limited one, that the Arizona initiative might be unlawful for other reasons-just not on First Amendment grounds. Judge Kozinski has previously argued that languages other than English should be banished from the public arena. He openly favors conformity over diversity and would "preserv[e] native tongues and dialects for private and family gatherings." *Gutierrez v. Mun. Ct. Of S.E. Judicial Dist.*, 861 F.2d 1187, 1193 (9th Cir.1988)(Kozinski, dissenting). Judge Kozinski's view of the rights of non-English speaking persons would make the Statue of Liberty weep. The divided house that Judge Kozinski fears is a world in which Spanish, Chinese, or Navajo is heard in public, a world in which individual liberty rather than government-mandated orthodoxy thrives.

*13 Judge Kozinski trots out a parade of horribles that he insists will come to haunt us if we do not accept his absolutist, authoritarian view. All his examples are absurd. No court in this country would protect a government employee who adopted one of the outlandish stances that Judge Kozinski so casuistically suggests. Were we to withhold rights from individuals because clever judges could conjure up hypothetical examples of frivolous law suits, there would soon be no rights left at all. Scare tactics are hardly a novel technique in my talented colleague's arsenal of en banc dissents. Recently, he warned that the majority opinion in another en banc case was a disaster of nearly unprecedented proportions, in fact a "tsunami." *U.S. v. Gaudin*, 28 F.3d 943, 955 (9th Cir.1994)(Kozinski, dissenting). In *Gaudin*, he wrote: "It's not every day, after all, that we provoke a conflict with every other regional circuit, defy Supreme Court authority, implicitly overrule several lines of our own case law-thereby creating a spider web of secondary circuit conflict...." *Id.* The majority held firm. The decision that Judge Kozinski so vehemently denounced was affirmed soon thereafter by the United States Supreme Court by a vote of 9-0. *U.S. v. Gaudin*, 115 S.Ct. 2310 (1995).

The true horror of this case is what could happen if Judge Kozinski's view prevailed. Government employees could be compelled to parrot racist and sexist slogans, to hurl hateful invective at non-English speaking people asking for assistance, to publicly declare their loyalty to political parties, and to bow toward the national or state capitol three times a day-and the First Amendment would offer them no protection whatsoever. Under Judge Kozinski's approach, non-English speakers would be relegated to second class status, deprived of information they desperately need to meet the basic necessities of their daily lives, and grievously handicapped in their efforts to pursue the American dream. It would be a sad day indeed for the



Constitution were we to betray our nation's history and uphold a measure that is so alien to America's most basic traditions.

FERNANDEZ, Circuit Judge, with whom Chief Judge Wallace and Judges Hall and Kleinfeld join, dissenting.

The State of Arizona, through its initiative process, added Article XXVIII to the State's constitution. That Article made English the official language of "the public schools and all government functions and actions." Ariz. Const. Art. XXVIII, s 1(2). It also directed that the State and all of its political subdivisions shall "act in English and in no other language," except in a handful of instances. *Id.* at s 3. The Article applies to "all government officials and employees during the performance of government business." *Id.* at s 1(3)(a)(iv). Maria-Kelley F. Yniguez [FN1] does not like Article XXVIII as a matter of policy. I can understand and sympathize with that. It is when she goes beyond the realm of policy and seeks to show that the Article violates the First Amendment to the United States Constitution that she goes astray. It is there that we part company.

FN1. She has been joined by Arizonans Against Constitutional Tampering (AACT), but this opinion will generally hereafter refer only to her for notational convenience.

She, in effect, proceeds from the fundamentally flawed assumption that while performing government business an official [FN2] or employee has much the same freedom as a private citizen. That leads her into a thicket of incorrect assumptions and assertions about the nature of her speech rights, the nature of language, [FN3] and the

rights and duties of the State when it chooses to speak for itself. As a result, she has left the proper analytical pathway and become hopelessly lost in a forest of her own hopes.

FN2. I see no substantial difference between employees and state officials when the officials are performing the business of the state.

FN3. I use the word "language" to refer to those bodies of words and their pronunciation and methods of combining them which are used and understood by a considerable community and established by long usage. *See* Webster's Third New International Dictionary 1270 (1986). Most prominently mentioned in this case are English and Spanish.

I believe that a relatively brief explanation of the relevant constitutional principles will adumbrate the proper path and show that Article XXVIII does not violate Yniguez's First Amendment rights. [FN4] In so doing I will assume, without deciding, that Article XXVIII is just as broad as it appears on its face and that it will, indeed, preclude Yniguez and other employees and officers of the State from speaking in a language other than English when performing state business, unless one of the special exceptions applies.

FN4. I undertake this explication with some disquiet because a jurisdictional question broods over this case. Yniguez herself no longer works for the State. That certainly moots her claim for injunctive relief. The Attorney General says that the State has expressly waived its Eleventh Amendment defense to nominal damages, but Yniguez did not ask for those damages in the district court. It seems unusual to allow her to now appeal the failure of the district court to grant those damages. *See Fitzgerald v. Century Park, Inc.*, 642 F.2d 356, 359 (9th Cir.1981) (declining to consider plaintiff's request for nominal damages raised for the first time on appeal). As to AACT, we have no evidence before us to indicate that it meets the requirements of the traditional standing



doctrine. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441, 53 L. Ed. 2d 383 (1977). However, we have declared a special rule that public interest group sponsors and supporters of initiative measures have standing as of right. *See United States v. City of Oakland*, 958 F.2d 300, 301 (9th Cir.1992); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir.1983), *aff'd*, 790 F.2d 760 (9th Cir.1986); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir.1982), *cert. denied*, 461 U.S. 913, 103 S. Ct. 1891, 77 L. Ed. 2d 282 (1983). The same rule must apply to public interest group opponents of initiative measures. Thus, I press on.

There can be no doubt that a public employee, like Yniguez, does not have a full panoply of freedoms to do what she likes when she is performing her job. On the contrary, the State can place numerous restrictions upon its employees. The very nature of the employment relationship allows that. For example, even were it assumed that "the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance," an employee may be restricted unless the regulation "is so irrational that it may be branded 'arbitrary.'" *Kelley v. Johnson*, 425 U.S. 238, 244, 248, 96 S. Ct. 1440, 1444, 1446, 47 L. Ed. 2d 708 (1976). Similarly, a citizen's Fourth Amendment privacy rights may be limited at his place of work. *See O'Connor v. Ortega*, 480 U.S. 709, 724-25, 107 S. Ct. 1492, 1501, 94 L. Ed. 2d 714 (1987). And even restrictions that reach beyond the job itself to activities outside the workplace may be proper. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557-65, 93 S. Ct. 2880, 2886-90, 37 L. Ed. 2d 796 (1973) (political campaigning or officeholding); *cf. United States v. National Treasury Employees Union*, ___ U.S. ___, 115 S. Ct. 1003, 1013-15, 130 L. Ed. 2d 964 (1995) (at least persons who are not senior executive officers, members of Congress, or judges cannot be subjected to a blanket ban on honoraria when

they address "a public audience ... outside the workplace, and [the] content [is] largely unrelated to their government employment").

It is true that we have come some way since Holmes, then a Justice of the Supreme Court of Massachusetts, wrote that "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass.1892). Still and all, as demonstrated by our continued restrictions on political action, we have not entirely abandoned even that concept. It is also true that "'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06, 87 S. Ct. 675, 685, 17 L. Ed. 2d 629 (1967); *see also Wieman v. Updegraff*, 344 U.S. 183, 191-92, 73 S. Ct. 215, 218-19, 97 L. Ed. 216 (1952) (oath regarding joining a revolutionary political party). But none of this is helpful to Yniguez, for the erosion of the restrictions upon employees has taken place in the area of their activities while they are not performing government functions. Membership in a political party or engaging in nongovernmental writing or other private activities is not the performance of a government function.

The distinction cuts closer to the bone when the Supreme Court's treatment of public versus private speech is considered. I will not go through the extensive history of that jurisprudence because its details have little to do with this case. The law in that area keys on the content of the speech itself. That is, was the speech on a matter of public concern or was it on a matter of private concern? *See, e.g., Waters v. Churchill*, ___ U.S. ___, 114 S. Ct. 1878, 1887, 128 L. Ed. 2d 686 (1994). Here, the issue involves the language used, not the public or private concern content of the language. An employee might well speak out



on a matter of public concern in any language, or might simply engage in private-concern grumbling or disruption in any language. The language does not, in the sense used here, change the content at all.

What is important, however, is the Supreme Court's description of the strength of the government's interests and the scope of a government employee's First Amendment rights. If the matter involved is not one of public concern, the court has left the matter almost entirely in the hands of the employing authority. As the Court said in *Connick v. Myers*, 461 U.S. 138, 146-47, 103 S. Ct. 1684, 1690, 75 L. Ed. 2d 708 (1983):

> [I]f Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. .... [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.... Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for

> employee grievances not afforded by the First Amendment to those who do not work for the State.

The Court went on to say that not "all matters which transpire within a government office are of public concern...." *Id.* at 149, 103 S. Ct. at 1691. *See also Waters*, ___ U.S. at ___, 114 S. Ct. at 1687 (1994).

It is worthy of note that even if the speech is of public concern, the employee does not have all of the freedom of speech of a private citizen. The government can still discipline the employee in the name of efficiency and the like if the government's interests in promoting those other concerns outweigh the employee's interest in speaking out. *See, e.g., id.* at ___, 114 S. Ct. at 1887-88; *Connick*, 461 U.S. at 149-54, 103 S. Ct. at 1691-93; *Pickering v. Board of Educ.*, 391 U.S. 563, 568-71, 88 S. Ct. 1731, 1734-36, 20 L. Ed. 2d 811 (1968). It is from this public concern balancing that Yniguez seeks to draw substantial support because the State has conceded that her speaking in a language other than English would often be more efficient. But efficiency is not the point because this is not a public concern speaking-out case. Nor, as I have said, do I think it is exactly a private concern case. In fact, none of the Supreme Court decisions regarding public or private concern speech involved an employee who was hired to speak for the government and who performed that function in a manner contrary to her instructions.

However, if I were forced to place this case in one pigeonhole or the other, I would say that it is more like a case of private concern speech. The simple fact is that the State, through its constitution, has determined that its work will be done in English, and Yniguez, for her own private reasons, does not wish to obey that determination. At any rate, unless one is thoroughly committed to the economic theory of law, which I am not, one must agree that more than efficiency drives the policies of government. Indeed,



as most dictators seem to believe, freedom itself can be very very inefficient.

Yniguez nevertheless argues that her use of a language of her choice to perform the State's business cannot be restricted. It can be said that each language has a content of its own and that languages are a mode of expressing ideas. Yniguez argues that because words are the skins of ideas, the content of what is said changes as one moves from one language to another. I think that it is true, but true to a limited extent. It is sometimes difficult enough to make oneself understood in a single language, and the difficulty can be multiplied when one attempts to translate that language into another. However, we should not put too much weight on the difficulties, for it is pellucid that languages are not so protean that we cannot recognize ideas in translation. Yet, I will assume (along with Yniguez) that the content does change to a measurable extent when the State's rules, regulations, and messages are changed into a different language, even if language is not pure content.

If that is true, it is a powerful reason to uphold Article XXVIII. It is well settled that the State has the right to control the content of what it is paying for; it can control what is said by those who are acting on its behalf. As the Supreme Court put it in *Rosenberger v. Rector and Visitors of Univ. of Va.*, ___ U.S. ___, ___, 115 S. Ct. 2510, 2518-19, 132 L. Ed. 2d 700 (1995):

> [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust v. Sullivan* [500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)] we upheld the government's prohibition on

> abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. 500 U.S. at 194. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

*Cf. Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 (9th Cir.)(private employers may preclude speaking of a language other than English on the job - "an employee must often sacrifice individual self-expression during working hours"), *reh'g en banc denied*, 13 F.3d 296 (1993), *cert. denied*, ___ U.S. ___ 114 S. Ct. 2726, 129 L. Ed. 2d 849 (1994); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410-12 (9th Cir.1987) (private radio broadcaster may insist that its employees broadcast in English); *Garcia*, 13 F.3d at 302 ("No reasonable person would suggest that Title VII requires the operator of an English language radio station to permit a hired broadcaster to broadcast ... in another language...") (Reinhardt, J., dissenting from denial of rehearing en banc); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1041 (9th Cir.), *reh'g en banc denied*, 861 F.2d 1187 (1988), *vacated as moot*, 490 U.S. 1016, 109 S. Ct. 1736, 104 L. Ed. 2d 174 (1989).

Thus, to the extent that language involves content, the State may choose to direct what that content must be. Moreover, it can hardly be doubted that the State can even choose to foster a particular language to some extent. As the Supreme Court said in *Meyer v. Nebraska*, 262 U.S. 390, 402, 43 S. Ct. 625, 628, 67 L. Ed. 1042 (1923) (emphasis added): "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, *including a requirement that they shall give instructions in English*, is not questioned." Certainly, if the State can require teaching in a particular language, it can itself choose to use a particular language to express the content of what it has to say.



To the extent that a language involves a mode of expressing ideas which themselves could be expressed in different languages, Yniguez's argument fares no better. It is most difficult to see why the State cannot constitutionally require its employees to use one mode of expression-one language-just as it can require that its employees use a particular mode of performing the rest of their duties. Surely, for example, the State can direct that its ditches be dug and that its contracts be let in particular ways, even if an employee correctly thinks that another mode of performance would be more efficient. Any good employer will listen to its employees' suggestions about how a job may best be done, but employers are not required to follow those suggestions. Nor does the First Amendment change that. *Cf. Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465, 99 S. Ct. 1826, 1828, 60 L. Ed. 2d 360 (1979) (per curiam).

When a mode of expression attracts First Amendment scrutiny, it is because it implicates ideas themselves. There is nothing sacrosanct about the mode. It, as a mode, could be regulated if the regulation only be rational. But where the mode becomes laden with content, the mode itself may be scrutinized so that any protected content will not be injured. As the Supreme Court said in *R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), in reference to sound trucks and fighting words: "[e]ach ... is a 'mode of speech' ...; both can be used to convey an idea, but neither has, in and of itself, a claim upon the First Amendment." *Id.* at ___, 112 S. Ct. at 2545. *See also Clark v. Community for Creative Non-Vio-*

*lence*, 468 U.S. 288, 293-95, 104 S. Ct. 3065, 3068-69, 82 L. Ed. 2d 221 (1984) (assuming - not deciding - that overnight camping is expressive conduct, it can still be regulated); *United States v. O'Brien*, 391 U.S. 367, 375, 88 S. Ct. 1673, 1678, 20 L. Ed. 2d 672 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). The point is underscored by *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). There, even though the mode of showing contempt was the highly expressive and content-laden act of burning the flag, only a bare majority of the Court was willing to find constitutional protection for the defendant's activities. *Id.* at 420, 109 S. Ct. at 2548.

Thus, Yniguez cannot seek First Amendment protection of the pure mode element of a language. The mode must itself seek shelter under the wing that protects the expressive or content element. However, as already indicated, the content element cannot help her here.

Of course, none of this means that the State can preclude the general public from learning or speaking a particular language. The State cannot do that. *See Farrington v. Tokushige*, 273 U.S. 284, 299, 47 S. Ct. 406, 409, 71 L. Ed. 646 (1927); *Bartels v. Iowa*, 262 U.S. 404, 411, 43 S. Ct. 628, 630, 67 L. Ed. 1047 (1923); *Meyer*, 262 U.S. at 400-03, 43 S. Ct. at 627-28; *cf. Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 573, 69 L. Ed. 1070 (1925). It does mean that any protection must be sought in a place other than the First Amendment, or for something other than the mode itself.

The penultimate line needed to sketch the path out of Yniguez's thicket can be drawn by considering the fact that individual citizens have no constitutional right to require that state services be performed in any particular language. When plaintiffs asserted that they had a constitutional right to have the State supply Spanish-speaking employees and notices in Spanish, we turned that claim aside. *See Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir.1973). And when a demand for bilingual education was made, we also turned that aside. *Guadalupe Org., Inc. v. Tempe Elementary Sch., Dist. No. 3*, 587 F.2d 1022, 1026-27 (9th Cir.1978). As we saw it, that was a question of a high political order and was one for the people themselves to decide. *Id.* at 1027. The people of Arizona decided the question here, for good or ill.



This case, then, presents a confluence of lines of argument. Employees of the State are subject to numerous restrictions upon their freedoms, their actions, and their speech, which the government could not impose upon the general public. The State can, in general, control the content and mode of its own speech, and the general public does not have a constitutional right to have the State provide services in any particular language. In the face of all of that, it is well nigh unintelligible to say that individual officers and employees of the State can perform state business in a language of their own choice, despite the State's direction that they shall use a particular language.

Of course, I recognize that a State's restrictions upon its employees must not be so irrational that they may be branded arbitrary. *See Kelley*, 425 U.S. at 248, 96 S. Ct. at 1446. Can this Article of the Arizona Constitution be so branded if we believe it to be ill-conceived? I think the answer lies in *Guadalupe Organization*, 587 F.2d at 1027 (citation omitted):

> Linguistic and cultural diversity within the nation-state, whatever may be its advantages from time to time, can restrict the scope of the fundamental compact. Diversity limits unity. Effective action by the nation-state rises to its peak of strength only when it is in response to aspirations unreservedly shared by each constituent

culture and language group. As affection which a culture or group bears toward a particular aspiration abates, and as the scope of sharing diminishes, the strength of the nation-state's government wanes.

Syncretism retards, and sometimes even reverses, the shrinkage of the compact caused by linguistic and cultural diversity. But it would be incautious to strengthen diversity in language and culture repeatedly trusting only in the syncretic processes to preserve the social compact. In the language of eighteenth century philosophy, the century in which our Constitution was written, the social compact depends on the force of benevolence which springs naturally from the hearts of all men but which attenuates as it crosses linguistic and cultural lines. Multiple linguistic and cultural centers impede both the egress of each center's own and the ingress of all others. Benevolence, moreover, spends much of its force within each center and, to reinforce affection toward insiders, hostility toward outsiders develops.

The fundamental nature of these tendencies makes clear that their scope varies from generation to generation and is fixed by the political process in its highest sense. The Constitution, aside from guaranteeing to individuals certain basic rights, privileges, powers, and immunities, does not speak to such matters; it merely evidences a compact whose scope and strength cannot be mandated by the courts but must be determined by the people acting upon the urgings of their hearts. The decision of the appellees to provide a predominantly monocultural and monolingual educational system was a rational response to a quintessentially "legitimate" state interest. The same perforce would be said were the appellees to adopt the appellants' demands and be challenged by an English-speaking child and his parents whose ancestors were Pilgrims.

Whatever may be the consequences, good or bad, of many tongues and cultures coexisting within a single



> nation-state, ... [their validity] cannot be determined by reference to the Constitution.

In fine, the people of the State of Arizona did not violate the First Amendment when they adopted Article XXVIII. For good or ill, it was a question "for the people to decide." *Id.*

Therefore, I respectfully dissent.

WALLACE, Chief Judge, concurring.

I fully join Judge Fernandez's dissent. I add the following:

Yniguez's claim that the Article regulates speech, not merely the expressive mode of speech, is dubious. The difficulties of Yniguez's claim become apparent when one tries to identify exactly what speech or message the Article suppresses. If Yniguez is able to identify to us in English the messages that the Article suppresses, she would thereby communicate those messages which she claims only Spanish can convey. In other words, by stating in English the speech or message which the Article restricts, Yniguez undermines her claim that her message can only be expressed in Spanish. Saddled with this problem, the majority, therefore, never identifies the content of the speech which the Article suppresses and writes vaguely about the Article's restrictions.

It is untenable for the majority to hold that the Article restricts pure speech yet fail to identify suppressed messages. This difficulty strengthens the undeniable conclusion that the Article regulates the mode of speech, not pure speech. This conclusion should end the matter, for mere regulation of government employees' mode of speech does

not implicate the First Amendment or require the various balancing tests which the majority employs.

The majority's failure to identify clearly the meaning conveyed by using one language rather than another confuses its evaluation of the interests favoring First Amendment protection. Building on recent Supreme Court decisions, the majority considers the public's right to "receive information and ideas" in order to determine whether Yniguez's speech is protected. Yet, the majority can point to no bit of information about medical malpractice claims which can only be communicated in a non-English language - and which Article XXVIII would thereby restrict Yniguez from communicating and the public from receiving. The majority is simply unable to show the public's interest in the unique content and meaning which Yniguez can only convey in the Spanish language. Instead, it points to the interests members of the public have in receiving Yniguez's message in a manner and language they can easily understand. In effect, the majority asserts that many Arizonans would prefer Yniguez speak in a mode which they can easily understand - no doubt a true observation, but the public's interest in a civil servant's particular mode of communication does not warrant First Amendment protection.

Also, the majority's view that when Yniguez speaks in a language other than English, she comments as a citizen on a matter of public concern ignores the cases which define "matter of public concern." These cases look to the content of public employees' speech to see whether it contributes to public debate. *See United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1015 (1995)(matter of public concern were speeches and articles for which government employees received payment); *Rankin v. McPherson*, 483 U.S. 378, 386 (1987)(matter of public concern was employee's highly negative opinion of President's policies); *Connick v. Myers*, 461 U.S. 138, 148



(1983) (questions about pressure on government lawyers to participate on political campaigns did not constitute speech on matter of public concern); *Pickering v. Board of Educ. of Township High School Dist.*, 391 U.S. 563, 569 (1968)(matter of public concern was letter to editor discussing school budget).

Contrary to precedent, the majority rules that if members of the public would like to receive public employees' speech in a certain way, that desire constitutes a matter of public concern. Such reasoning ignores the difference between a government employee who contributes to the marketplace of ideas and an employee who speaks in a mode which helps members of the public understanding what he says. The most recent Supreme Court case on point found that speech is of public concern when it "addresse[s] a public audience, [is] made outside the workplace, and involve[s] content largely unrelated to ... government employment." *National Treasury Employees*, 115 S. Ct. at 1013. The purportedly suppressed speech here does not fit this description.

KOZINSKI, Circuit Judge, with whom Judge Kleinfeld joins, dissenting.

A house divided
against itself cannot stand.
- Abraham Lincoln

Government has no mouth, it has no hands or feet; it speaks and acts through people. Government employees must do what the state can't do for itself because it lacks corporeal existence; in a real sense, they *are* the state. This case is about whether state employees may arrest the gears of government by refusing to say or do what the state chooses to have said or done.

The majority says yes. Or, to be precise, it says the employees may force their employer into federal court and make it prove, to the exacting standard of the First Amendment, that its interest in enforcing its laws outweighs their right not to make statements they find objectionable. This is an extraordinary ruling with explosive and far-reaching consequences. Almost everything government does involves a communication of some sort and those charged with carrying out government functions sometimes disagree with what they are ordered to say or do. Before today, however, it was understood that government employees have no personal stake in what they say in the course of employment because that speech is the government's, not theirs.

Today's decision rends this fundamental understanding of how government works by giving bureaucrats the right to turn every policy disagreement into a federal lawsuit. Maria-Kelly Yniguez was hired by the State of Arizona to perform various functions connected with processing medical malpractice claims. The people of Arizona - Yniguez's ultimate superiors - then augmented her duties: They charged her with promoting English by using only that language for official business. The people of Arizona were warned that this might disrupt services and make government employees less efficient. *See* Arizona Publicity Pamphlet 32-33 (General Election, Nov. 8, 1988)(arguments against Proposition 106 by Rose Mofford, Governor; Morris K. Udall, U.S. Representative; Jesus "Chuy" Higuera, Arizona State Senator). Arizonans nevertheless chose to make this tradeoff. Since they were paying Yniguez's salary, I had assumed it was their call whether Yniguez spent her work-time processing claims, promoting English or twiddling her thumbs.

Not so, says the majority. Because the law in question requires Yniguez to *speak*, she acquires First Amendment rights in the content and manner of that speech. Majority



Op. at 12734-44. What Yniguez says, and in what tongue, is thus no longer a business judgment by her employer; it's a constitutional question. If Yniguez disagrees, she can haul her employer into federal court and force it to prove that the law's advantages outweigh her right to say what she pleases. Nor is this pro forma, rationality review. As the interminable majority opinion demonstrates, this is high-octane review involving all sorts of substantive judgments about the wisdom and efficacy of the law in question. Majority Op. at 12744-54.

Such scrutiny is highly intrusive, as well as costly and time-consuming. We must ask ourselves, therefore, whether similar challenges could be raised by other government employees with qualms about the laws they're hired to enforce. The alarming truth is that there's nothing unique about Yniguez's situation, nothing unusual about her claim. The same sort of challenge could be raised by just about every disgruntled government employee.

Consider the following example: A Deputy Attorney General develops doubts about whether the death penalty is constitutional; he files a brief urging the state supreme court to vacate a death sentence. Can the Attorney General discipline him? Not anymore. Like Yniguez, the Deputy can claim the brief is *his* speech (after all, it carries his name) and he has First Amendment rights not to say things that chafe his conscience and offend the Constitution. He can argue, as does Yniguez, that the law in question serves no legitimate purpose; he can show, like Yniguez, that abandoning the law would make him more efficient.

How can the state meet such a challenge? How can it hope to establish, to the demanding standard erected by the majority, that its interest in pursuing the death penalty outweighs the Deputy's First Amendment right to espouse a contrary view? Whether the death penalty deters violent

crime or serves other legitimate ends are questions about which reasonable minds differ; there are many-including some of my colleagues, *see, e.g.*, Stephen Reinhardt, "The Supreme Court, The Death Penalty, and the *Harris* Case," 102 *Yale L.J.* 205, 216 (1992)("[T]he courts may be functionally incapable of handling death penalty cases fairly and judiciously.") - who believe the death penalty is a cruel anachronism. The state couldn't demur that the Deputy's superiors had made the policy judgment and merely assigned him the task of implementing it. Yniguez's superiors had decided to promote the use of English and merely assigned her the job of implementing that policy. Like Yniguez, the prosecutor would be entitled to argue that the federal court should change his job description.

So too would zillions of other government employees, like the following:

* City adopts bilingual policy to give non-Anglophone residents better access to government services, but employee claims a First Amendment right to speak only English. In his view, use of other languages denies minority groups a fair opportunity to assimilate.

* Social worker disagrees with county's policy of encouraging single mothers to enter the workforce and tells mother to stay home with her baby.

* Public school teacher disagrees with school district's policy of teaching evolution and tells students that man sprang into being from the tears of the Egyptian god Ra-Atum.

* Deputy sheriff thinks *Miranda* warning is silly and tells suspects, "Lawyers are slime-balls. 'Fess up, and the judge'll go easy on you."



* Recruiter for public university disagrees with state's affirmative action policy and tells minority applicants not to "expect any favors."

Most cases may, after much litigation, be resolved in favor of the government. But there would be no way to keep them out of court. And in no case would the state be entitled to say, "We chose policy X because we had a hunch it might work, but we haven't any proof." No, indeed. When confronted with what will come to be known as a Yniguez challenge, states, cities, counties, even the federal government, will have to prove that their laws are worth the candle; courts will routinely make judgments traditionally reserved for the legislature and the people themselves. By comparison, *Lochner v. New York*, 198 U.S. 45 (1905), will seem like a paean to judicial restraint.

This problem cannot be solved by tinkering with the fine points of the rule announced today. The fault lies in the rule's central premise - the dangerous notion that government employees have a personal stake in the words they utter when they speak for the government. The force of this idea will turn government employment into a platform for endless attacks on government policy and governance into a tug of war between those who make the laws and those who enforce them.

The majority masks the enormity of its departure by pretending this is just another employee-speech case like *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), or *Waters v. Churchill*, 114 S. Ct. 1878 (1994). But the question in those cases was whether employees could be disciplined for what they said *as private citizens*. In such circumstances, the Court explained, "[t]he problem ... is to arrive at a balance between the interests of the [employee], *as a citizen*, in commenting upon matters of public concern and

the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 381 U.S. at 568 (emphasis added). Yniguez's case has nothing in common with *Pickering* because the speech here belongs to the government; there's nothing to balance.

Under *Pickering* and *Waters*, Yniguez can try to change the law through the political process; she can speak out against Article XXVIII on her own time, and in any language she pleases; she can campaign for its repeal. This is much different from the right the majority creates for her - the right to block government policy because she happens to disagree with it.

Twice in recent years has the Supreme Court relied on the pivotal distinction the majority ignores. In *Rust v. Sullivan*, 500 U.S. 173 (1991), federally-funded medical clinics were prohibited from counseling about abortion; the clinics argued that this prohibition violated the free speech rights of their employees. The Supreme Court shrugged: Those who work in clinics that take federal money must conform their on-the-job speech to federal law. This doesn't offend the First Amendment because "[t]he employees remain free ... to pursue abortion-related activities when they are ... acting as private individuals." *Id.* at 198-99.

The Court again addressed the issue in *Rosenberger v. University of Virginia*, 63 U.S.L.W. 4702 (U.S. June 29, 1995). The question in *Rosenberger* was whether the state could deny funding to a student publication based on its content. The Court said no, because the speech at issue wasn't the government's. In reaching this conclusion, it distinguished *Rust* and *Widmar v. Vincent*, 454 U.S. 263 (1981), as standing for the proposition that "when the State is the speaker, it may make content-based choices." 63 U.S.L.W. at 4706. The Court went on to explain that it



has "permitted the government to regulate the content of what is or is not expressed *when it is the speaker or when it enlists private entities to convey its own message.*" *Id.* (emphasis added).

Confronted with recent Supreme Court cases that cut the heart from its analysis, the majority responds with ... a footnote. Majority Op. at 12735 n.24. And what a footnote! As best one can tell, the majority reads *Rust* and *Rosenberger* as applying only where the government uses a private party to disseminate its message, not where it speaks through its own employees. This would be a pretty good argument, were it not for two things: the Supreme Court's language and common sense. As for language, one need look no farther than the passage from *Rosenberger* underscored above. The Court there holds that government may control the content of speech both where "it is the speaker" and where "it enlists private entities to convey its own message." *Rosenberger*, 63 U.S.L.W. at 4706. Since government "is the speaker" only through its employees, *Rust* and *Rosenberger* clearly encompass Yniguez's situation. In dismissing these cases as dealing with "entirely different circumstances," the majority overlooks what the Court in fact said.

But put language aside and consider the logic of the situation: What earthly reason would there be to give employees of government-subsidized entities fewer First Amendment rights than public employees? Does the majority think the government could refuse to fund an otherwise qualified private group because its employees speak out against the government? Or belong to the wrong political party? Or practice an unpopular religion? Surely not. *Pickering, Waters* and *Branti v. Finkel*, 445 U.S. 507 (1980), protect employees of private entities vying for government funding no less than public employees. The reason *Rust* and *Rosenberger* saw no First Amendment problem when government controls the speech of those

who carry its message is that this is perfectly consistent with *Pickering*. *Rust* and *Rosenberger* stand squarely for the proposition that the government may write the script when it is the speaker.

This is not to say that Arizona's English-only policy is constitutional. As the majority and the concurrence point out, Article XXVIII makes it harder for many Arizonans to receive government services. A successful challenge might be raised by those whose ability to deal with their government is thereby impaired. Nor is the First Amendment the only basis on which the policy might be attacked; Yniguez also charges that the English-only policy violates equal protection and conflicts with Title VI of the Civil Rights Act of 1964, 42 U.S.C. s 2000d. No court has yet considered these arguments, which go more directly to the heart of this dispute. But to give Yniguez the right to decide what she will say when she is the state's agent opens the courthouse door to countless other employees who disagree with some expressive aspect of their jobs. While I understand my colleagues' eagerness to do away with a law they see as misguided and divisive, the price they pay is too high. No rational society can afford it.



975 F.2d 646

59 Empl. Prac. Dec. P 41,764

**Maria-Kelly F. YNIGUEZ; Jaime P. Gutierrez, Plaintiffs,**

**v.**

**STATE of Arizona, Defendant-Appellee.**

**Robert D. Parks; Arizonans for Official English, Applicants in intervention-Appellants.**

Maria-Kelly F. YNIGUEZ; Jaime P. Gutierrez, Plaintiffs-Appellees,

v.

Rose MOFFORD, individually and as Governor of the State of Arizona; Robert Corbin, individually and as Attorney General of the State of Arizona, Defendants-Appellants.

Robert D. Parks; Arizonans for Official English, Applicants in intervention-Appellees.

Nos. 90-15546, 90-15581.

United States Court of Appeals, Ninth Circuit.

Suggestion of Mootness Sept. 16, 1991.

Decided Sept. 16, 1992.

Robert K. Corbin, Atty. Gen., Anthony B. Ching, Sol. Gen., Paula S. Bickett, Asst. Atty. Gen., Phoenix, Ariz., for appellants.

Robert J. Pohlman, Ryley, Carlock & Applewhite, P.A., Phoenix, Ariz., for plaintiffs-appellees.

Barnaby W. Zall, Williams & Jensen, Washington, D.C., James F. Henderson, Scult, Lazarus, French, Zwillinger & Smock, Phoenix, Ariz., for appellants, movants, intervenors.

Appeal from the United States District Court for the District of Arizona.

Before: TANG, REINHARDT, and FLETCHER, Circuit Judges.

PER CURIAM:

The facts of this case have been reviewed elsewhere, *see Yniguez v. State of Arizona*, 939 F.2d 727, 729-30 (9th Cir.1991). In considering the State's suggestion of mootness, there is no reason to do more than mention them briefly. After Arizona voters amended their state constitution to include a provision requiring all state employees to speak only English, the plaintiff Maria-Kelly Yniguez, a state employee, brought an action alleging that the provision violated her federal constitutional rights. The district court agreed and granted her declaratory relief. The state decided not to appeal. Because of the state's decision, Robert D. Park, the sponsor of the state constitutional amendment, sought to intervene in the action for the purpose of appealing the district court's order. The district court denied his motion. We reversed, allowing Park to intervene in the action, and retained jurisdiction over the appeal. *See id.* at 740.

Following our decision, the state filed its suggestion of mootness. The state pointed out that the plaintiff has ceased to be a state employee and suggested that, as a result, the case is moot. We disagree with the state's suggestion; the case is not now moot.

Although the plaintiff may no longer be affected by the English only provision, that does not render her action moot. The plaintiff's constitutional claims may entitle her to an award of nominal damages. *See Carey v. Piphus*, 435 U.S. 247, 258-59, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252 (1978). [FN1] A plaintiff's pursuit of nominal damages provides a sufficiently concrete interest in the outcome of the litigation to confer standing to pursue declaratory relief and thereby prevents mootness. See *Lokey v. Richardson*, 600 F.2d 1265, 1266 (9th Cir.1979), *cert. denied*, 449 U.S. 884, 101 S.Ct. 238, 66 L.Ed.2d 110 (1980); 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure s 3533.3, at 266 (2d ed. 1984); *see also Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, 466



U.S. 435, 442, 104 S.Ct. 1883, 1889, 80 L.Ed.2d 428 (1984) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.").

FN1. Although the plaintiff's complaint does not expressly request nominal damages, it did request "all other relief that the Court deems just and proper under the circumstances." That is sufficient to permit the plaintiff to pursue nominal damages. *See Liberty Nat'l Ins. Holding Co. v. The Charter Co.*, 734 F.2d 545, 560 n. 31 (11th Cir.1984); *Rental Develop. Corp. v. Lavery*, 304 F.2d 839, 842 (9th Cir.1962).

We note that this is true even though the district court did not award nominal damages. Following our decision allowing intervention, Park is permitted to file a notice of appeal with the district court. *See Zuber v. Allen*, 387 F.2d 862, 863 (D.C.Cir.1967); *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir.1953). Yniguez may then file her own notice of appeal, *see* Fed.R.App.P. 4(a)(3), in which she may seek review of the district court's failure to award nominal damages. [FN2] The possibility that Yniguez may seek nominal damages on appeal is sufficient to prevent mootness. *See Caroline T. v. Hudson School Dist.*, 915 F.2d 752, 757 (1st Cir.1990)("[T]his court finds that the dismissal with prejudice does not render the case moot, because Caroline may seek judicial review of the dismissal order and may request that the district court remand the case to the Department of Education for a continued administrative hearing.").

FN2. Although Yniguez did not previously appeal the district court's implicit denial of a request for nominal damages, she had no reason to seek this form of relief at the time of the district court's judgment. Only now does the state press its mootness argument. Yniguez therefore may raise the issue of nominal damages in a future cross-appeal. *Cf. Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.)(declining to consider issue that could

have been mised in prior appeal), *cert. denied*, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed.2d 62 (1982).

If in the future it appears that Yniguez's own claim has become moot through failure to seek nominal damages, the district court should consider two further possibilities, both of which arise from the fact that Yniguez brought her suit in a quasi-representational capacity. The first is that mootness may be avoided by the intervention of a new plaintiff whose claim against the operation of the English only provision is not moot. *See Kennerly v. United States*, 721 F.2d 1252, 1260 (9th Cir.1983). The second is that if other individuals who are affected by the provision did not pursue their claims in reliance on Yniguez's continued pursuit of her own, Yniguez may have standing as a result of their reliance. *See Bach v. Coughlin*, 508 F.2d 303, 306 (7th Cir.1974). We leave these matters initially to the district court.

In conclusion, we reject the state's suggestion of mootness. The district court may now proceed to allow the parties to perfect their appeals and to conduct further proceedings in conformity with our dispositions. [FN3]

FN3. In addition, we reject Park's motion to recall our mandate. Contrary to his contention and as we have explained, *supra*, further proceedings before the district court are necessary prior to our taking any further action with respect to this matter.



730 F.Supp. 309, 58 USLW 2472, 53 Empl. Prac. Dec. P 39,759

**Maria-Kelly F. YNIGUEZ and Jaime P. Gutierrez, Plaintiffs,**

**v.**

**Rose MOFFORD, individually and as Governor of the State of Arizona, Robert K. Corbin, individually and as Attorney General of the State of Arizona, and Catherine Eden, individually and as Director of the Department of Administration of the State of Arizona, Defendants.**

No. CIV 88-1854 PHX PGR.

United States District Court,

D. Arizona.

Feb. 6, 1990.

Robert J. Pohlman, Phoenix, Ariz., for plaintiffs.

Anthony B. Ching, Sol. Gen., Phoenix, Ariz., for defendants.

MEMORANDUM OPINION AND ORDER

ROSENBLATT, District Judge.

As a result of a general election held on November 8, 1988, Article XXVIII, entitled "English as the Official Language", was added to the Arizona Constitution. In an action brought pursuant to 42 U.S.C. s 1983, the plaintiffs seek to have Article XXVIII declared unconstitutional and its enforcement enjoined, claiming that the Article violates the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. s 2000d, *et seq.*, Title VI of the Civil Rights Act of 1964. Article XXVIII, which formally went into effect on December 5, 1988, provides in part that English shall be the official language of the State of Arizona and all of its political subdivisions, that the Article is applicable to all branches of government and to all government officials and employees during the performance of government business, that the state and its political

subdivisions shall take all reasonable steps to preserve, protect and enhance the role of English as the state's official language, that the state and its political subdivisions, with some limited exceptions, shall act only in English, and that private citizens shall have standing to bring suit to enforce the Article.

This action, which names as defendants, both individually and in their official capacities, Rose Mofford, Governor of the State of Arizona, Robert Corbin, Attorney General of the State of Arizona, and Catherine Eden, Director of the Department of Administration of the State of Arizona, was commenced on November 10, 1988 by Maria-Kelly Yniguez; Jaime Gutierrez was added as a plaintiff in a second amended complaint. Both plaintiffs are of Hispanic descent and are fluent in English and Spanish. Yniguez, who is employed by the Risk Management Division of the Arizona Department of Administration as an insurance claims manager, often spoke Spanish prior to the enactment of Article XXVIII with Spanish-speaking persons who were asserting medical malpractice claims against the state. Yniguez ceased speaking Spanish while performing her official duties immediately after Article XXVIII was passed because it was her interpretation of the Article that she could be sanctioned if she continued to speak Spanish. Gutierrez, an Arizona state senator, spoke Spanish prior to the enactment of Article XXVIII when communicating with his Spanish-speaking constituents and continues to do so. Both plaintiffs have signed state loyalty oaths promising to obey the Arizona Constitution.

The defendants have filed a motion seeking the dismissal of Yniguez's claims, which the court has treated as a motion for summary judgment, and a separate motion seeking the dismissal of Gutierrez's claims. The plaintiffs have filed a motion seeking a preliminary injunction. Pursuant to the stipulation of the parties, the trial on the merits was combined with the evidentiary hearing on the mo-



tion for preliminary injunction. For the reasons set forth herein, the court finds that the only appropriate parties to this action are Yniguez and Mofford and that Yniguez is entitled to have a judgment issued declaring Article XXVIII unconstitutional as facially overbroad in violation of the First Amendment.

**Eleventh Amendment**

Yniguez's original complaint only named the State of Arizona as a defendant. On the same day the state filed a motion seeking its dismissal on Eleventh Amendment grounds, Yniguez filed an amended complaint adding defendants Mofford, Corbin and Eden. The court subsequently dismissed the State of Arizona as a defendant but denied the Eleventh Amendment defense as to the individual defendants in what was specifically described as a preliminary ruling. While they did not specifically reassert the Eleventh Amendment defense in their pending motion to dismiss Yniguez's claims, the defendants did raise it in connection with their motion to dismiss Gutierrez's claims.

The defendants argue that they cannot be subjected to Gutierrez's suit due to the bar of the Eleventh Amendment. Although Eleventh Amendment immunity extends to actions against state officers sued in their official capacities since such actions are in effect brought against the state, *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir.1982), suits for declaratory and injunctive relief, such as the instant action, against state officers in their official capacities are not barred by the Eleventh Amendment if those officers have some connection to the enforcement of the allegedly unconstitutional state law, which connection may arise from either the specific law itself or from the state's general law. *Ex parte Young*, 209 U.S. 123, 157, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908). As state executive branch officials with no power to enforce Article XXVIII *vis-a-vis* Gutierrez, an elected official of the state legislative branch, neither Mofford, Corbin or Eden possess the

enforcement connection required under the Young doctrine. Neither Article XXVIII nor any state law or regulation gives the named defendants, by virtue of their offices, any authority to force a state legislator to comply with Article XXVIII or to subject a state legislator to any type of sanction should he or she fail to comply with it. Gutierrez's claims against Mofford, Corbin and Eden are therefore barred by the Eleventh Amendment.

The situation is different with respect to Yniguez's claims in that the court now concludes that Mofford and Eden, by virtue of their respective offices of Governor and Director of the Department of Administration, have a sufficiently direct connection with the enforcement of Article XXVIII as far as Yniguez is concerned to be appropriate defendants under the *Ex parte Young* doctrine, but that Corbin does not. Both Mofford and Eden possess the authority to enforce Article XXVIII against state service employees, such as Yniguez, since such employees are subject to discipline or dismissal if they fail to comply with state laws and rules. A.R.S. s 41-770 (1985); A.C.R.R. R2-5-501 (1986). Mofford's authority in this regard derives from her constitutional duty to take care that laws are faithfully executed, Ariz. Const. art. V, s 4, and her statutory duty to supervise the official conduct of all executive and ministerial officers, A.R.S. s 41-101(A)(1) (1985); Eden's authority stems from her statutory responsibility to direct and control the state personnel administration program. A.R.S. ss 41-761 (1985), 41- 763(2) (1985).

Defendant Corbin, on the other hand, has no authority simply by virtue as his position as state attorney general to force a state service employee such as Yniguez to comply with Article XXVIII. Under Arizona law, the attorney general law has no common law powers, only statutory powers. *Arizona State Land Dept. v. McFate*, 87 Ariz. 139, 142, 348 P.2d 912, 914 (1960). The fact that the state attorney general's office has the authority pursuant to



A.R.S. s 41-193(A)(2) (1985) to "prosecute ... any proceeding in a state court other than the supreme court in which the state or an officer thereof is a party or has an interest" does not in and of itself make Corbin an appropriate party defendant under the *Young* decision since this provision does not permit the attorney general to initiate an original proceeding absent specific statutory power. *McFate*, 87 Ariz. at 145, 348 P.2d at 916. Article XXVIII does not specifically give the Arizona Attorney General any power to initiate an action to enforce its dictates; section 4 of the Article, the section entitled "Enforcement; Standing", only refers to enforcement suits by private citizens. Nor does the state's general law accord Corbin any authority to prosecute an action against a state employee who fails to comply with a law such as Article XXVIII. The Eleventh Amendment therefore bars Yniguez's suit against Corbin.

**Case or Controversy**

The defendants have challenged the propriety of this action in part on the basis that no actual case or controversy exists as required by Article III of the United States Constitution. The inquiry into standing involves both constitutional limitations on this court's jurisdiction and prudential limitations on the exercise of that jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975). The constitutional limitations on standing, which are derived from Article III's case or controversy requirement, limit access to federal courts to plaintiffs who can show that they personally have suffered some actual or threatened injury as a result of the allegedly wrongful action of the defendant and that injury fairly can be traced to the challenged action and is likely to be redressed by the requested relief. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). The court finds that Yniguez has met these requirements sufficiently to establish that she has standing

to prosecute this action; for that reason, and due to its finding above on the *Ex parte Young* issue, the court will not separately consider the issue of Gutierrez's standing. *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir.1986).

The defendants' assertion that a case or controversy is lacking is derived primarily from what they perceive as the conjectural and hypothetical and self- imposed nature of the injury Yniguez alleges she has suffered and is continuing to suffer from as a result of the enactment of Article XXVIII. It is the defendants' position that the existence of Article XXVIII does not constitute a justiciable threat because Attorney General Corbin has formally interpreted Article XXVIII as not imposing any restrictions on Yniguez's continued use of Spanish during the course of her official duties and the defendants have stated on the record that Yniguez may continue to speak Spanish without fear of official retribution, and because the possibility of her being sued by a private citizen under the private right of action provision of Article XXVIII is too remote and speculative to constitute an actual injury.

The court finds that Yniguez has met the requirement of an injury in fact to the extent that she asserts an injury resulting from Governor Mofford's official actions. As a state government employee within the meaning of Article XXVIII who desires to speak a language other than English during the performance of her official duties, Yniguez is an individual to whom the Article's prohibitions are specifically directed and, if her interpretation of Article XXVIII is correct, is an individual against whom sanctions could be applied, whether by some form of disciplinary action or by suits by private parties, for her continued use of the Spanish language during the course of her employment. The mere fact that no enforcement action of any sort has as yet been threatened against Yniguez, other than what can be inferred from the stipulated facts that Mofford



has officially stated that she intends to comply with Article XXVIII and expects state service employees, of which Yniguez is one, to comply with Article XXVIII, does not make Yniguez's injury hypothetical given the immediacy of the effect of Article XXVIII's alleged chilling nature. *Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir.1989). Nor is Yniguez's injury any less actual because her decision to cease speaking Spanish in connection with her employment is self-imposed. As the Supreme Court has noted, the danger associated with laws which limit First Amendment rights is to a large extent one of self-censorship, which is a harm that can be realized even without an actual enforcement action. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393, 108 S.Ct. 636, 642, 98 L.Ed.2d 782 (1988).

The court's finding that Yniguez possesses the requisite standing is a limited one because there is no evidence of record to establish that Yniguez's asserted injury is anything except purely conjectural and hypothetical to the extent that it stems from any private actions of the defendants. For that reason, the court concludes that no case or controversy exists sufficient to subject any of the defendants to this action in their individual capacities.

Furthermore, while Mofford's stated intention to enforce Article XXVIII establishes the requisite connection between her and Yniguez's alleged injury, *see NAACP v. California*, 511 F.Supp. 1244, 1261-62 (E.D.Cal.1981), *aff'd*, 711 F.2d 121 (9th Cir.1983); *Shell Oil Co. v. Noel*, 608 F.2d 208, 213 (1st Cir.1979), no such causal nexus exists between defendant Corbin's position as state attorney general and Yniguez's asserted injury. Corbin's lack of statutory authority over the enforcement of Article XXVIII not only requires his dismissal from this action under the *Ex parte Young* doctrine, but also under Article III because no injury cited by Yniguez is fairly traceable to any action by him. *Southern Pacific Transp. Co. v.*

*Brown*, 651 F.2d 613, 615 (9th Cir.1980). Yniguez's alleged injury is not the result of any putatively unlawful action taken by Eden either, notwithstanding the fact that Eden has an enforcement connection with Article XXVIII sufficient to satisfy Young. Nothing in the record establishes that Eden has undertaken, or has threatened to undertake, any action which may be considered causally connected to any harm suffered by Yniguez; the only possible connection is derivative of Mofford's statement that she intends to enforce Article XXVIII, but that is not a sufficiently direct source of any injury to Yniguez to warrant Eden's inclusion in this action.

The defendants also argue that standing does not exist in this action because Yniguez's claims run afoul of the prudential standing limitation that a plaintiff generally must assert his or her own legal rights and interests. This issue is raised in response to the fact that Yniguez's assertion of standing is predicated in part on her right to assert the unconstitutionality of Article XXVIII on behalf of third parties not before the court whose rights are allegedly chilled by the overbreadth of the Article. The First Amendment doctrine of substantial overbreadth is an exception to the traditional prudential rule that a person to whom a law may be constitutionally applied may not challenge the law on the ground that it may conceivably be unconstitutionally applied to others. *New York v. Ferber*, 458 U.S. 747, 767-68, 102 S.Ct. 3348, 3359-60, 73 L.Ed.2d 1113 (1982). Yniguez has alleged a sufficiently colorable claim that Article XXVIII is overly broad in violation of the First Amendment rights of other Arizona government officials and employees not before the court to confer standing on her even if her own First Amendment rights are not violated by Article XXVIII. *Virginia v. American Booksellers Ass'n*, 484 U.S. at 392-93, 108 S.Ct. at 642-43.



**Facial Invalidity**

The plaintiffs argue that Article XXVIII should be invalidated on its face in part because it violates the First Amendment overbreadth doctrine. An overbreadth challenge is appropriately entertained in this case because Article XXVIII, by its literal wording, is capable of reaching expression protected by the First Amendment, such as Gutierrez's right to communicate in Spanish with his Spanish-speaking constituents. Facial invalidation of Article XXVIII is mandated, however, only if its overbreadth is both real and substantial judged in relation to the Article's plainly legitimate sweep, *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973), and the Article is not susceptible to a narrowing construction that would cure any constitutional infirmities. *Id.* at 613, 93 S.Ct. at 2916. While the Supreme Court has acknowledged that the concept of "substantial overbreadth" is not readily reduced to an exact definition, it has made it clear that a law cannot be facially invalidated as overbroad simply because some constitutionally impermissible applications of the law are conceivable. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984). For such an invalidation to be appropriate, a substantial number of instances must exist in which the overbroad law can be applied in contravention of the First Amendment. *New York State Club Ass'n, v. City of New York*, 487 U.S. 1, 13, 108 S.Ct. 2225, 2234, 101 L.Ed.2d 1 (1988).

In order to determine whether Article XXVIII reaches a substantial amount of constitutionally protected conduct, the court must first determine what the Article means, *Broadrick v. Oklahoma*, 413 U.S. at 618 n. 16, 93 S.Ct. at 2919 n. 16, which is a matter of substantial dispute between the parties. The plaintiffs' position is that Article XXVIII is a blanket prohibition on the use of any lan-

guage other than English in the state workplace, whereas the defendants' position is that Article XXVIII does not reach that broadly because it is merely a directive for state and local governmental entities to act in English when acting in their sovereign capacities. For the purposes of the instant action, the court finds from Article XXVIII's plain language that it is a prohibition on the use of any language other than English by all officers and employees of all political subdivisions in Arizona while performing their official duties, save to the extent that they may be allowed to use a foreign language by the limited exceptions contained in s 3(2) of Article XXVIII. Given this interpretation of the Article, an interpretation obviously not binding on state authorities, *id.*; *Webster v. Reproductive Health Services*, --- U.S. ----, 109 S.Ct. 3040, 3060, 106 L.Ed.2d 410 (1989)(O'Connor, J., concurring), the court concludes that there is a realistic danger of, and a substantial potential for, the unconstitutional application of Article XXVIII.

The court's determination of Article XXVIII's facial validity is not dependent upon Yniguez having a First Amendment right to speak a language of her choice during the performance of her official duties, a "right" which the defendants assert does not exist. All the court need find, and all it does find in this regard, is that Article XXVIII is so broad as to inhibit the constitutionally protected speech of third parties. While public employees, as a general proposition, enjoy less First Amendment protection than private citizens because governmental entities have a significant interest as employers in regulating the speech of their employees so as to promote the efficiency of public services, *Pickering v. Bd. of Educ. of TP. H.S. Dist. 205, Ill.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), a state may not apply stricter First Amendment standards to its legislators than it may to private citizens, *Bond v. Floyd*, 385 U.S. 116, 132-133, 87 S.Ct. 339, 347- 48, 17 L.Ed.2d 235 (1966), nor may a state require



that its officers and employees relinquish rights guaranteed them by the First Amendment as a condition of public employment. *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261 (1977). The sweeping language of Article XXVIII has such a prohibited effect however. When read at its full literal breadth, Article XXVIII would force Arizona governmental officers and employees whose use of a non-English language in the performance of their official duties is protected by the First Amendment, such as state legislators speaking to constituents in a language other than English, state employees officially commenting on matters of public concern in a language other than English, and state judges performing marriage ceremonies in a language other than English, to either violate their sworn oaths to obey the state constitution, and thereby subject themselves to potential sanctions and private suits, or to curtail their free speech rights.

Although the plaintiffs have not argued that Article XXVIII is unconstitutionally vague, vagueness affects the overbreadth analysis because in determining whether Article XXVIII is so overbroad as to deter others from engaging in otherwise protected expression the court has to evaluate the ambiguous as well as the unambiguous scope of the Article. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 6, 102 S.Ct. 1186, 1191 n. 6, 71 L.Ed.2d 362 (1982). While the defendants' assertion that the examples of Article XXVIII's unconstitutional reach proffered by the plaintiffs are too extreme to demonstrate the Article's facial unconstitutionality because they represent situations which plainly do not come within the rational parameters of Article XXVIII may be correct, the defendants' assertion only emphasizes Article XXVIII's potential for chilling First Amendment rights. *See Baggett v. Bullitt*, 377 U.S. 360, 373, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377 (1964). If those affected by

Article XXVIII are unclear as to its coverage, the result will be that they will "'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." *Id.* at 372, 84 S.Ct. at 1322. Yniguez's self-imposed decision to refrain from speaking Spanish while performing her job, a decision vociferously criticized as unfounded by the defendants, is but a product of her legitimate sensitivity to the perils posed by the Article's language and her desire to restrict her conduct to that which is unquestionably safe. *Id.* A law which reasonably results in such restrictions is substantially overbroad.

In determining the facial constitutionality of Article XXVIII the court must also consider any authoritative limiting construction placed on the enactment by Arizona state courts or enforcement agencies, *Broadrick v. Oklahoma*, 413 U.S. at 618, 93 S.Ct. at 2919, because a state law cannot be facially invalidated as overbroad if it is readily susceptible to a narrowing construction that would make it constitutional. *Virginia v. American Booksellers Ass'n*, 484 U.S. at 397, 108 S.Ct. at 645. As the Supreme Court has noted, the key to the application of this principle is that the state law must be "readily susceptible" of the limitation proffered by the state court or agency because a federal court lacks the power itself to rewrite a state law to conform it to constitutional requirements. Id.

No Arizona state court has as yet construed or interpreted Article XXVIII. The Arizona Attorney General has, however, construed Article XXVIII in a narrow fashion in a formal opinion, I89-009, an opinion which the defendants argue resolves the overbreadth issue in this action. While the court must consider the Attorney General's opinion to some degree, *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222 (1972), the opinion is not binding on this court and the court declines to follow it. A state attorney general's interpretation of a state law which is not binding on the courts



of that state cannot be accepted as authoritative by this court. *Virginia v. American Booksellers Ass'n*, 484 U.S. at 395, 108 S.Ct. at 643. Attorney General Corbin's opinion construing Article XXVIII is merely an advisory one under Arizona law and is not binding on either the Arizona courts, *Marston's, Inc. v. Roman Catholic Church of Phoenix*, 132 Ariz. 90, 94, 644 P.2d 244, 248 (1982), or on any citizen who sues under Article XXVIII's private right of action provision. Furthermore, the Attorney General's opinion does not address all of the issues raised by the plaintiffs in this action, the opinion's main concern being the effect of Article XXVIII on the use of non-English languages in the delivery of governmental services. More importantly, however, the Attorney General's interpretation of Article XXVIII does not amount to a sufficient limiting construction because the Article is not readily susceptible to the Attorney General's construction, a construction that is simply at odds with Article XXVIII's plain language.

The gist of the Attorney General's interpretation of Article XXVIII is that the English-only requirement applies solely to official acts of the state governmental entities and does not prohibit the use of languages other than English that are reasonably necessary to facilitate the day-to-day operation of government. The Attorney General's belief that Article XXVIII is directed only towards sovereign governmental acts centers upon s 3(1)(a) of Article XXVIII which provides, with a few limited exceptions, that the "State and all political subdivisions of this State shall act in English and in no other language." The Attorney General's interpretation of what "to act" means, however, in effect ignores s 1(3)(a)(iv) of Article XXVIII which states that the Article applies to "all government officials and employees during the performance of government business." The various levels of legislative, executive and judicial branches of government in Arizona af-

fected by Article XXVIII perform business in a whole variety of ways that do not rise to the level of "sovereign" acts, as the Attorney General apparently uses that term. The manner in which the term "act" is used in s 3(2) of the Article, the subsection setting forth the exceptions to the ban on the use of non-English languages, is illustrative of the unreasonableness of the Attorney General's limitation on the meaning of "act". Under the provisions of s 3(2)(c), for example, a governmental entity within Arizona "may act in a language other than English" to teach a student a foreign language as part of an educational curriculum. While the teaching of a foreign language by a public school teacher comes within the definition of performing government business, it does not come within the definition of performing a sovereign act. The Attorney General's restrictive interpretation of Article XXVIII is in effect a "remarkable job of plastic surgery upon the face of the ordinance," *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 89 S.Ct. 935, 940, 22 L.Ed.2d 162 (1969), and one which this court cannot accept.

The defendants have not proffered any other limiting construction of Article XXVIII and the court is unable to discern any construction to which the Article is fairly subject that would limit its application in such a way as to render unnecessary or substantially modify the federal constitutional questions.

**Abstention**

The defendants, invoking the abstention doctrine of *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), argue that this court should abstain from considering the merits of this action in order to allow the Arizona courts the initial opportunity to determine the scope of Article XXVIII. A federal court may not abstain under Pullman unless the complaint touches a sensitive area of social policy upon which federal courts should not enter unless no other alternative to its adjudica-



tion is available, a definitive ruling on the state issue would terminate the controversy, and the possibly determinative issue of state law is doubtful. *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir.1989). The court needs only to consider the first factor to determine that this is an inappropriate case for abstention. While cases involving facial challenges based on the First Amendment are not exempt from the invocation of the abstention doctrine, it is the position of the Ninth Circuit Court of Appeals that the first *Pullman* factor will almost never be present in such cases because the guarantee of free expression is always an area of particular federal concern. *Id.* The Ninth Circuit has, moreover, held to its policy that abstention is generally inappropriate in First Amendment cases even in suits in which the state court has not had the opportunity to narrow the allegedly unconstitutional statute. *Id.* at 1049. The Supreme Court has also been "particularly reluctant" to abstain in cases involving First Amendment facial challenges. *City of Houston, Texas v. Hill*, 482 U.S. 451, 467, 107 S.Ct. 2502, 2512, 96 L.Ed.2d 398 (1987). Furthermore, abstention would be inappropriate even if no First Amendment facial challenge existed in light of the court's conclusion that Article XXVIII is not obviously susceptible of a limiting construction. *Id.* at 468, 107 S.Ct. at 2513.

**Declaratory and Injunctive Relief**

Given the court's conclusion that Article XXVIII is substantially overbroad, Yniguez is entitled to a judgment pursuant to 28 U.S.C. s 2201 declaring Article XXVIII unconstitutional as violative of the First Amendment. Having so found, the court does not reach the plaintiffs' claims that Article XXVIII also violates the Fourteenth Amendment and 42 U.S.C. s 2000d et seq. An injunction restraining the enforcement or threatened enforcement of Article XXVIII has also been requested but the prerequisites for such relief have not been sufficiently met; moreover, the court can see no need for such relief even if an injunction

could properly be issued. In the absence of a pending enforcement action, Yniguez's burden of establishing a right to injunctive relief in federal court is much greater than her burden of establishing a right to declaratory relief. *Steffel v. Thompson*, 415 U.S. 452, 471-72, 94 S.Ct. 1209, 1221-22, 39 L.Ed.2d 505 (1974); *Polykoff v. Collins*, 816 F.2d 1326, 1333 (9th Cir.1987). While Yniguez has established a sufficient threat of enforcement to provide an actual controversy for purposes of Article III and the Declaratory Judgment Act, she has not established an enforcement threat sufficient to warrant injunctive relief. Injunctive relief is appropriate where there are "'exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights.'" *Wooley v. Maynard*, 430 U.S. 705, 712, 97 S.Ct. 1428, 1434, 51 L.Ed.2d 752 (1977). The record before the court contains no showing of a substantial threat of irreparable injury to Yniguez or any other person to whom Article XXVIII is applicable if an injunction is not now issued and the court is confident that Governor Mofford will abide by its declaration of Article XXVIII's facial invalidity without the necessity of an injunction barring her and those acting at her behest or under her control from enforcing the Article. Therefore,

IT IS ORDERED that the defendants' Motion to Dismiss (doc. # 30) and defendants' Motion to Dismiss Plaintiff Gutierrez's Claim for Relief (doc. # 68) are granted in part and denied in part. They are granted to the extent that all parties except plaintiff Yniguez and defendant Mofford in her official capacity are dismissed from this action. The motions are denied in all other respects.

IT IS FURTHER ORDERED that the plaintiffs' Application for Preliminary Injunction (doc. # 15) is denied.

IT IS FURTHER ORDERED that Article XXVIII of the Constitution of the State of Arizona is hereby declared



to be void as being invalid on its face in violation of the First Amendment of the Constitution of the United States.

**APPENDIX**

Article XXVIII of the Arizona Constitution provides as follows:

ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE

1. English as the Official Language; Applicability.

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3)(a) This Article applies to: (i) the legislative, executive and judicial branches of government, (ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities, (iii) all statutes, ordinances, rules, orders, programs and policies, (iv) all government officials and employees during the performance of government business. (b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

2. Requiring This State to Preserve, Protect and Enhance English.

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the state of Arizona.

3. Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.

Section 3. (1) Except as provided in Subsection (2): (a) This State and all political subdivisions of this State shall act in English and in no other language. (b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English. (c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances: (a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English. (b) to comply with other federal laws. (c) to teach a student a foreign language as part of a required or voluntary educational curriculum. (d) to protect public health or safety. (e) to protect the rights of criminal defendants or victims of crime.

4. Enforcement; Standing.

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

Supreme Court, U.S.
FILED
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No. 95-974

In The

# Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

*Petitioners*

v.

STATE OF ARIZONA; MARIA-KELLY F. YNIGUEZ; JAIME GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

*Respondents*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT YNIGUEZ

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## BRIEF IN OPPOSITION OF RESPONDENT YNIGUEZ

TO THE HONORABLE SUPREME COURT:

Respondent Maria-Kelly F. Yniguez respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners Arizonans for Official English and Robert D. Park.

## OPINIONS BELOW

The statement contained in the Petition is adequate[1] with the following correction:

> The District Court's decision on the merits, reported at 730 F.Supp. 309 was rendered in 1990 (not 1989).

## STATEMENT OF THE CASE

The operative facts are set forth in the opinions below with one noteworthy exception – the opinions below do not mention the State's binding factual admission that it has "no legitimate purpose in restricting" Ms. Yniguez' non-English speech in the course of her performing government business. Appendix at 1-2. With this addition, the complete facts are contained in the lower courts' opinions.

[1] Contrary to the express requirements of Rule 14.1(i)(ii), *Rules of the Supreme Court of the United States*, the Petitioner's Appendix does not contain the opinions reported at 939 F.2d 727 (9th Cir. 1991) and 130 F.R.D. 410 (D. Ariz. 1990).

## REASONS FOR DENYING THE WRIT

### I. THE QUESTIONS PRESENTED IN THE PETITION ARE NOT SUPPORTED BY THE FACTS.

At issue is Article XXVIII of the Arizona Constitution, a singularly oppressive *ex ante* prohibition that forbids elected and appointed officials, judges and all state employees from using any language other than English during any performance of government business. The Article is not restricted to "official speech" and "official acts" as the Petition suggests throughout. Rather, its prohibitive sweep is much broader, encompassing all speech in the government workplace. Only by misconstruing and ignoring the literal language of Article XXVIII can the Petition's "Questions Presented" be reached. A fair reading of Article XXVIII both vitiates those questions and demonstrates the impropriety of certiorari.

#### A. Article XXVIII Is A Unique Blanket Prior Restraint.

The Petition intimates that certiorari should be granted because "Official Language" legislation is "common" and the issues raised in the case below are likely to recur. Nothing could be further from the truth. Although official language legislation is not particularly unusual, the sweeping prohibitions of Arizona's Article XXVIII are singularly unique. The Article is not uniform legislation. There is no similarly worded counterpart in any jurisdiction. It is completely atypical and totally dissimilar from other official language legislation. Its prohibitive provisions were aptly described by one author as "by far the most restrictively worded official-English law to date."



M. Arrington, Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & Pol. 325, 337 (1991).

Unlike other official language legislation, Article XXVIII does much more than simply require that "English be used to perform official acts" as the Petition urges. No existing legislation other than Article XXVIII totally bans the use of any non-English language by "all government officials and employees during the performance of government business." No official language law apart from Article XXVIII precludes elected and appointed officials, including the judiciary, from selecting the language they deem appropriate to perform their jobs. No other legislation acts as a wholesale prior restraint on non-English speech by government employees.[2] No other statute known places limits on the speech rights of democratically-elected representatives. Only Article XXVIII is so prohibitive.

Because its provisions are so unique, the judicial construction given to Article XXVIII neither impacts any other official-English legislation nor otherwise invites this Court's attention.

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[2] *See e.g.*, Ark. Code Ann. § 1-4-117 (identifying the state's official language along with the state bird, state tree, and state folk dance); Ill. Code § 460/20 (identifying the state's official language with the provisions for the state mineral, state slogan, and state song); N.D. Cent. Code § 54-02-13 (identifying the state's official language as well as the state fossil, state grass, and state beverage).

### B. The State Admitted It Had "No Legitimate Purpose" In Precluding Ms. Yniguez From Speaking Spanish As She Did On The Job.

The Petition omits key facts central to the issues decided below. For example, it was stipulated as a matter of fact that, in performing her job, Ms. Yniguez spoke only the most appropriate language required to effectively communicate with her audience. Appendix at 7. She spoke English to people who spoke only English, Spanish to those speaking only Spanish, and an appropriate combination of the two to those who were bilingual. *Id.* Moreover, it was a stipulated fact that Ms. Yniguez' use of Spanish in the performance of "government business contributes to the efficient operation" and "administration of the State." Appendix at 8. Indeed, this contribution to efficiency was not confined to Ms. Yniguez' speech alone. It was also stipulated that the efficient operation and administration of the State is enhanced by permitting all State service employees to communicate with citizens in non-English where appropriate. *Id.* These factual stipulations, binding on Petitioners, are studiously ignored in the Petition. *See United States v. California Coop. Canneries*, 279 U.S. 553, 556 (1929) (holding that an intervenor takes the case as he finds it). Finally, these stipulated facts were buttressed by the State's *Fed.R.Civ.P.* 36 binding factual admission that: "[T]he State of Arizona has no legitimate purpose in restricting Maria-Kelly F. Yniguez from using the Spanish language in the course of her performing government business." Appendix at 2.

The impact of these facts on any First Amendment analysis is self-evident. It also explains why these facts



are ignored in the Petition. This is not a case where a disgruntled employee seeks to force a language choice on her employer. Rather, it presents a case where the State, for no legitimate reason, seeks to gag the speech of all of its employees and prevent the free flow of information to, and from, its citizens.

### C. The Petition Mischaracterizes The Operative Facts.

The Petition is replete with misstatements of material fact, significant omissions, and distortion of the record below. Correction of these inaccuracies underscores the propriety of denying certiorari.

Illustrative of the Petition's mischaracterization of the record is the statement that Ms. "Yniguez testified that some of those [malpractice claim] settlement forms were drafted in Spanish without English translations." Petition, p. 2. The Petition apparently proceeds from this premise to assert: "Ms. Yniguez wanted to write her claim release forms in a language her supervisor couldn't understand." *Id.* at 14. The latter statement is false and the premise on which it is based was specifically withdrawn at trial. The precise testimony on which the Petition relies was recognized at trial by all parties to have been factually erroneous. It was corrected by a factual stipulation that English translations indeed existed in Ms. Yniguez' files. That stipulation was expressly accepted by the trial court:

> MR. CHING: Okay. In regard to [stipulation] number two, number two was necessitated because in the cross-examination of Miss

Yniguez the last time, at Page 67 and 68 of the transcript, Miss Yniguez testified that the settlement releases in the files concerning those claims that she worked on had releases in Spanish only, and that there was no English version of it. The question by me was:

> "QUESTION: Okay. And is there also an English version of it on file?
>
> "ANSWER: No."

What happened after that is that Miss Yniguez has had the opportunity to look at files and refresh her memory and discovered that that statement was incorrect.

> THE COURT: Very well. Stipulation is accepted.
>
> * * *
>
> MR. CHING: . . . The fact is that the witness gave us three files, and in one of which there is a Spanish version which is not – which is signed and an English version unsigned, but it's there. But in the other two files they were signed versions as to both languages.
>
> THE COURT: I think that's what the Court understands from the testimony and from the stipulation, the only difference being that as I understand the plaintiff's testimony, she prepared the English translation of the Spanish settlement document and placed it in the file so that there would clearly be an English translation.

Appendix at 4-5. The record thus refutes the Petition's intimation that Ms. Yniguez sought to evade supervision.



Additionally, akin to its failure to advise the Court of the factual matters set forth in subparagraph B above, the Petition omits at least two other material facts bearing on the decisions below. First, the Petition omits mention of the stipulated fact that, before passage of Article XXVIII, Ms. Yniguez spoke both publicly and privately in Spanish to State employees concerning State business and matters of public and private concern. Appendix at 8. This fact provides substantial support for the decisions below. After passage of Article XXVIII, Ms. Yniguez ceased speaking Spanish in the workplace altogether because of what the District Court found to be a "legitimate sensitivity to the perils imposed by the Article's language and her desire to restrict her conduct to that which is unquestionably safe." *Yniguez v. Mofford*, 730 F.Supp. 309, 315 (D.Ariz. 1990); Appendix to Petition for Writ of Certiorari (hereinafter "Petitioners' Appendix") at 108a. Speech by government employees on matters of public concern is plainly afforded certain protections under the First Amendment. It was just such speech by Ms. Yniguez that the District Court found was chilled by Article XXVIII.[3] *Id.*; Petitioners' Appendix at 101a-102a.

The second material omission is the Petition's failure to acknowledge the testimony of Jaime Gutierrez, a bilingual Arizona State Senator. Senator Gutierrez testified he

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[3] The Petition asserts that the District "Court did not find that Yniguez's own constitutional rights were abridged." Petition at 4. In fact, the District Court actually found that "Yniguez has met the requirement of injury in fact" due to the threat of enforcement of Article XXVIII against her by then Governor Mofford and the "chilling nature" of the Article. *Yniguez v. Mofford*, 730 F.Supp. at 312; Petitioners' Appendix at 102a-103a.

feared being sued by private citizens (under Section 4 of Article XXVIII) for speaking in Spanish to his Spanish-speaking constituents. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 925 (9th Cir. 1995); Petitioners' Appendix at 6a. This uncontroverted testimony directly supports the Ninth Circuit's overbreadth conclusions. The Petition should have referenced it.

### D. The Petition Mischaracterizes The Underlying Opinions.

The Petition's analysis of the decisions below is no more evenhanded than its analysis of the facts. By employing a carefully redacted quotation, the Petition creates the misimpression that the District Court found that "anyone could use any language that he or she chose in the performance of their jobs." Petition at 3 and 4. No such finding was made, nor can such a finding be fairly adduced. The District Court, like the Court of Appeals, simply recognized that First Amendment protection extends to the speech of state legislators, judges, and government employees commenting on matters of public concern. *Yniguez v. Arizona*, 730 F.Supp. at 314; Petitioners' Appendix at 107a. The truncated quotation contained in the Petition omits the three specific examples the District Court selected to illustrate the unquestionably protected nature of certain categories of state employee speech – speech that Article XXVIII unambiguously and unlawfully restricts. Indeed, the District Court expressly disavowed any finding of a purported "right" of a government employee to speak a language of choice. *Id.*; Petitioners' Appendix at 106a. The Petition's



suggestion that the decisions below create an unfettered new employee right of language choice is wholly unfounded.

Moreover, although the Petition also claims that the Ninth Circuit found that an employee has a constitutional or statutory right to "force language choice on an employer," Petition at 12, that claim is also unfounded. In truth, the Court of Appeals expressly rejected any such right:

> The group [Arizonans for Official English] contends that appellees seek the right to speak another language at will and regardless of whether the intended recipient of the speech primarily speaks that language or is even able to comprehend it. However, such a "right" would be of a far different order than the right at issue here. As the facts show, Yniguez spoke Spanish with Spanish-speaking claimants and English with English-speaking claimants. She does not claim any right to "choose" to speak Spanish with claimants who would not understand her, nor would this or any other court uphold such a right. Accordingly, in the interests of clarity, we emphasize that by ruling that the state cannot unreasonably limit the use of non-English languages, we do not imply that the state is therefore forced to allow inappropriate or burdensome language uses.

*Yniguez v. Arizonans for Official English*, 69 F.3d 920, 943 (9th Cir. 1995); Petitioners' Appendix at 46a-47a.

The Petition's assertion that the Court of Appeals found a "constitutional right to government services in languages other than English" is similarly unfounded.

Petition at 11. The Court of Appeals made no such finding. In fact, it expressly rejected the identical contention below:

> In the case before us, there is no claim of an affirmative right to compel the state to provide multilingual information, but instead only a claim of a negative right: that the state cannot, consistent with the First Amendment, gag the employees currently providing members of the public with information and thereby effectively preclude large numbers of persons from receiving information that they have previously received. Such a claim falls squarely within the confines of traditional free speech doctrine, and is in no way dependent on a finding of an affirmative duty on the part of the state.
>
> The clearest example of the distinction between affirmative and negative rights may be seen in the case of a state legislator who may seek office and be elected in part because of his ability to speak with his constituents in their native languages. No one could order such an official to speak Spanish or Navajo. Neither, however, can the state preclude him or his staff from transmitting information regarding official state business to persons resident in his district in whatever language he deems to be in the best interest of those he was elected to serve.

*Id.* at 936-37 (citations omitted); Petitioners' Appendix at 32a-33a. Invalidation of a gag order is not the equivalent of forcing speech. The Petition's contention that the decisions below have spawned a new constitutional right to force multi-lingual government services is without merit.



Finally, the Petition claims that six purported "new First Amendment doctrines" result from the decision below. Petition at 14-15. The Ninth Circuit's decision creates no new doctrines. The purported new doctrines set forth in the Petition are merely disingenuous paraphrasings of portions of the Court of Appeals' opinion – portions not essential to the ultimate holding. The Courts below simply held that Article XXVIII is facially and unconstitutionally overbroad. The propriety of this holding is stated with clarity in Judge Brunetti's concurrence:

> Article XXVIII offends the First Amendment not merely because it attempts to regulate ordinary political speech but because it attempts to manipulate the political process by regulating the speech of elected officials.

*Id.* at 950; Petitioners' Appendix at 62a.

Article XXVIII was declared unconstitutional following settled First Amendment case law pronounced by this Court. No broad new doctrines were created or espoused and no issues were raised that merit imposing on the scarce time resources of this Court.

## II. THE OPINIONS BELOW ARE CONSISTENT WITH DECISIONS OF THIS COURT.

The Court of Appeals' opinion carefully analyzes relevant decisions of this Court in considering the First Amendment implications of Article XXVIII. It reexamines cases dating as far back as the 1920s in which this Court

invalidated laws restricting the use of non-English languages. In doing so, the Court of Appeals acknowledges the importance of "the American tradition of tolerance, a tradition that recognizes the critical difference between encouraging the use of English and repressing the use of other languages." *Id.* at 923; Petitioners' Appendix at 3a. In affirming the unconstitutionality of Article XXVIII, the Ninth Circuit expressly adhered to the principles established in *Meyer v. Nebraska*:

> In deciding this case, therefore, we are guided by what the Supreme Court wrote in *Meyer*:
>
> > The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution – a desirable end cannot be promoted by prohibited means.

*Id.* at 923-924 (citing *Meyer*, 262 U.S. 390, 401 (1923)).

The Ninth Circuit reviewed the District Court's determination that Article XXVIII is unconstitutionally overbroad by applying this Court's long-standing test for overbreadth. It properly applied the *Broadrick v. Oklahoma* rule that a regulation will be invalidated on facial overbreadth grounds only where "its overbreadth is both real and substantial judged in relation to its plainly legitimate sweep, and the provision is not susceptible to a narrowing construction that will cure its constitutional infirmity." *Id.* at 931 (referencing *Broadrick*, 413 U.S. 601, 613, 615 (1973)); Petitioners' Appendix at 21a. In other words,



a substantial number of instances must exist in which a challenged provision violates the First Amendment before it is found to be unconstitutional. *Id.* at 932; Petitioner's Appendix at 22a. Having found numerous respects in which Article XXVIII violates the First Amendment, the Ninth Circuit agreed with the District Court that the Article should be stricken on overbreadth grounds. That opinion is entirely consistent with *Meyer* and *Broadrick*.

The Petition also asserts that the Ninth Circuit failed to properly apply *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. ___, 132 L.Ed.2d 700 (1995) . The Ninth Circuit opinion, however, gives thoughtful consideration to these cases and finds that no conflict is presented. *Yniguez v. Arizonans for Official English*, 69 F.3d at 940 n.24; Petitioners' Appendix at 40a-41a. Both the Petition and Judge Kozinski in his dissent misperceive the applicability of *Rust* and *Rosenberger* to this case. Both the Petition and Judge Kozinski contend that Article XXVIII is a proper exercise of governmental power because the "government may write the script when it is the speaker." *Id.* at 963; Petitioners' Appendix at 92a. The problem with this contention is that Article XXVIII does not affect only speech where the government is the speaker. It goes much further. It unambigously affects private speech entitled to First Amendment protection. The Article acts as a prior restraint on the speech of elected officials, judges, and state employees where the First Amendment prohibits the government from "scripting" speech. Article XXVIII also restricts all speech of government employees in the workplace, whether or not they are speaking as

citizens on matters of public concern.[4] Of course, this Court has repeatedly held that speech by a public employee as a citizen on matters of public concern cannot be "scripted." *See, e.g., Pickering v. Board of Educ.*, 391 U.S. 563, 572-74 (1968). *Ex ante* restrictions on plainly protected speech are a world apart from the restrictions addressed in *Rust* and *Rosenberger*. *See Yniguez v. Arizonans for Official English*, 69 F.3d at 940 n.24; Petitioner's Appendix at 40a-41a.

Moreover, in both *Rust* and *Rosenberger*, as the Ninth Circuit noted, this Court recognized that the government has broad – though not unlimited – power to regulate the government-subsidized speech of private parties. In *Rust*, this Court addressed government subsidized speech by private parties carrying out government programs. Among other things, this Court focused on the fact that the subsidy recipient was not compelled to operate under the government program and that the restricted information could be received elsewhere. *Id.* at 199 n.5; 114 L.Ed.

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[4] Because Article XXVIII resulted from an initiative referendum, there is no legislative history. In such circumstances, courts may resort to publicity pamphlets accompanying the ballots to determine intent. *Bussanich v. Douglas*, 152 Ariz. 447, 450, 733 P.2d 644, 647 (Ct.App. 1986). An "argument 'for' " Article XXVIII submitted to the voters manifested the intended broad reach of the Article:

> Passage of [Article XXVIII] will in no way eliminate or discourage the study of foreign languages in our schools. Neither will it disallow the use of any language in conversations in home, churches or among friends in the private workplace.

Appendix at 11. The plain inference from this argument is that non-English conversations among friends in the public workplace, including conversations protected by the First Amendment, are prohibited.



2d at 259 n.5. Unlike *Rust*, this case does not involve government subsidies of private programs. Furthermore, in this case, recipients of government services have nowhere to turn for government information except to people like Ms. Yniguez. Thus, this case does not present the alternatives and choices that were so important to the Court's analysis in *Rust*.

*Rosenberger*, similarly, involved government subsidized speech – this time by private parties pursuing private goals. In determining that the governmental restriction at issue violated the First Amendment, this Court stated that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." 515 U.S. at ___, 132 L.Ed.2d at 715. The *Rosenberger* decision cited *Rust* for the proposition that: "[w]hen the government *disburses public funds to private entities to convey a governmental message*, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the *grantee*." *Id.* at ___, 132 L.Ed.2d at 718 (emphasis added). Because Article XXVIII goes far beyond impacting only government speech or governmental messages the Ninth Circuit correctly found *Rust* and *Rosenberger* to be irrelevant. *Yniguez v. Arizonans for Official English*, 69 F.3d at 940 n.24; Petitioners' Appendix at 40a.

In sum, no one doubts the government's power to deliver a particular message or to regulate the content of its own speech. Conversely, all agree that government workers are not deprived of all First Amendment rights

simply by virtue of their employment status.[5] The analysis consistently used by this Court to weigh the competing interests of the government and its employees in regulating speech is the *Connick-Pickering* balancing test.[6] There is nothing revolutionary or novel about the Ninth Circuit's opinion. Here, the well-established *Connick-Pickering* test is studiously applied by the Ninth Circuit to a unique set of facts. Review of that analysis is unnecessary and would squander this Court's resources.

The Ninth Circuit analysis is also completely consistent with this Court's decision in *United States v. National Treasury Employees Union*, 513 U.S. ___, 130 L.Ed.2d 964 (1995). *Treasury Employees Union* declared that even relatively minimal prior restraints on government employee speech create such sweeping impediments that the *Connick-Pickering* test used to evaluate a *post hoc* restriction is too lenient. *Id.* at ___, 130 L.Ed.2d at 979-80. Rather, where the government seeks an *ex ante* prohibition of employee speech – as Article XXVIII does – it must satisfy a heightened burden which evaluates not only the interests of the government employees in speaking freely, but also the

[5] No court has ever held that public employees have no First Amendment rights when they are speaking in the course of their duties. Rather, courts have found First Amendment protection available even to speech made as part of one's job duties. *See e.g., Williams v. Kentucky*, 24 F.3d 1526 (6th Cir. 1994); *Koch v. Hutchinson*, 841 F.2d 1436, 1442 (10th Cir. 1988).

[6] *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (employing a balancing test that weighs the interest of the employee in speaking on matters of public concern against the government's interest in promoting efficiency).



interests of possible recipients of those communications. *Id.* at ___, 130 L.Ed.2d at 980-81 The Ninth Circuit noted: "*National Treasury Employees Union* makes it clear that public employee speech doctrine weighs heavily the public's 'right to receive information and ideas' by affording First Amendment protection to speech that the public has an interest in receiving." *Yniguez v. Arizonans for Official English*, 69 F.3d at 942; Petitioners' Appendix at 44a.[7]

## III. THE PROCEDURAL POSTURE INVITES DENIAL OF THE PETITION.

### A. Alternative Grounds For Invalidation Of Article XXVIII Were Preserved.

Because both the District Court and the Ninth Circuit concluded that Article XXVIII violates the First Amendment, neither court reached the additional constitutional and statutory grounds raised by Ms. Yniguez for invalidating the Article.[8] In his dissent, Judge Kozinski recognized that additional proper grounds may exist for invalidating the Article XXVIII:

> This is not to say that Arizona's English-only policy is constitutional. As the majority and the concurrence point out, Article XXVIII makes it

[7] As a part of her duties, Ms. Yniguez resolved petitions by citizens with grievances against the State. Communicating such grievances is itself constitutionally protected speech. U.S. Const. amend. I.

[8] Substantial facts were adduced at the trial court level establishing, *inter alia*, the disparate impact of Article XXVIII on discrete ethnic minorities.

> harder for many Arizonans to receive government services. A successful challenge might be raised by those whose ability to deal with their government is thereby impaired. Nor is the First Amendment the only basis on which the policy might be attacked; Yniguez also charges that the English-only policy violates equal protection and conflicts with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. No court has yet considered these arguments, which go more directly to the heart of this dispute.

*Id.* at 963; Petitioner's Appendix at 92a.

These issues would necessarily have to be resolved by the trial court should this Court grant the Petition and reverse the judgment. The resulting potential for relitigation and lack of finality in a case which has been pending for more than seven years militates heavily against granting the Petition.

### B. Reversal Would Result In Inconsistent Judgments.

Then Governor Rose Mofford of Arizona, the only defendant bound by the District Court judgment, did not appeal that decision.[9] As a result, the judgment is final as to her and her successors in any action against Ms. Yniguez. *See Yniguez v. Mofford*, 939 F.2d 727, 737 (9th Cir. 1991). Reversal by this Court would result in two diametrically opposed final judgments in this action. Such an undesirable situation should be avoided.

[9] Moreover, the State of Arizona neither petitioned this Court for certiorari nor did it join in the instant petition. Because this is a case under 42 U.S.C. § 1983, the Petitioners' peculiar interests in furthering their own objectives coupled with the lack of participation by the State of Arizona makes this case an unsuitable vehicle for reviewing the decisions below.



## IV. THE PETITION'S TENTH AMENDMENT ARGUMENT WAS NOT RAISED BELOW.

After five years of appellate-level litigation, for the first time in these proceedings[10] the Petition raises an argument based upon the Tenth Amendment and notions of federalism. It is inappropriate, in a petition for writ of certiorari, to raise an issue not raised before.[11] *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. ___, 132 L.Ed.2d 650, 659 (1995) (stating "[w]hatever the fact may be, the case was not presented and decided [using a First Amendment analysis]. The record facts before us and the opinions below address only the Establishment Clause issue; that is the question upon which we granted certiorari; and that is the sole question before us to decide.")

[10] Also, for the first time, the Petition suggests that Article XXVIII should not be struck down in its entirety. Petition, p. 21. This suggestion is completely contrary to the Petitioners' consistent position below. *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 933 (9th Cir. 1995). ("[T]he parties before the court have never treated Article XXVIII as anything other than a single entity that must stand or fall as a whole.")

[11] Petitioners had numerous opportunities to raise the issue by, *inter alia*, filing a complaint in intervention, briefing the issue to the three-judge Ninth Circuit panel, requesting consideration of the issue in their suggestion for rehearing *en banc*, or in their supplemental brief on rehearing. They did none of these.

## V. CONCLUSION.

Article XXVIII is singularly unique among official language statutes. The atypical factual background of this case does not invite review. The opinions below create no conflicts with existing case law. They are correct, well-reasoned and wholly-consistent with applicable precedent. Further review is not warranted.

Respectfully submitted,

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October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

*Petitioners*

v.

STATE OF ARIZONA; MARIA-KELLY F. YNIGUEZ; JAIME GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

*Respondents*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENT YNIGUEZ

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Attorneys for the Plaintiff

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

| | |
|---|---|
| MARIA-KELLY F. YNIGUEZ,<br>Plaintiff,<br><br>vs.<br><br>ROSE MOFFORD, individually and as Governor of the State of Arizona, ROBERTK. [sic] CORBIN, individually and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona,<br><br>Defendants. | **CIV NO. 88-1854 PHX PGR**<br>ANSWERS TO **PLAINTIFF'S FIRST SET OF NON-UNIFORM INTERROGATORIES AND REQUESTS FOR ADMISSION** |

To: Defendants Rose Mofford, Robert K. Corbin and Catherine Eden and their attorney, Robert K. Corbin, Attorney General and Anthony Ching, Solicitor General

Pursuant to Rules 26, 33 and 36, *Fed.R.Civ.P.*, Plaintiff requests that Defendants answer in writing and under oath, within thirty (30) days from the date of service hereof, or within such other time as may be ordered by

the Court, the following non-uniform interrogatories and requests for admissions:

* * *

**REQUEST FOR ADMISSION NO. 18:** Admit that the State of Arizona has no legitimate purpose in restricting Maria-Kelly F. Yniguez from using the Spanish language in the course of her performing government business.

Admit.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | | |
|---|---|---|
| MARIE-KELLY F. YNIGUEZ, et al., | ) | No. CIV-88-1854-PHX-PGR |
| Plaintiff, | ) | Phoenix, Arizona |
| vs. | ) | April 27, 1989 |
| STATE OF ARIZONA, et al., | ) | 9:33 A.M. |
| Defendant. | ) | |

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
DEFENDANTS' MOTION TO DISMISS

APPEARANCES:

| | |
|---|---|
| For the Plaintiffs: | Pohlman & Sanders, P.A.<br>By: ROBERT J. POHLMAN, Esq.<br>2525 E. AZ Biltmore Cir., #220<br>Phoenix, Arizona 85016 |
| For the Defendants: | Office of the attorney general<br>By: ANTHONY B. CHING, Esq.<br>1275 W. Washington<br>Phoenix, Arizona 85007-2997 |
| Court Reporter: | William A. Mc Nutt, III, RPR<br>230 N. First Ave., Room 7404<br>Phoenix, Arizona 85025<br>(602) 253-0707 |

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

MR. CHING: Okay. In regard to number two, number two was necessitated because in the cross-examination of Ms. Yniguez the last time, at Page 67 and 68 of the transcript, Miss Yniguez testified that the settlement releases in the files concerning those claims that she worked on had releases in Spanish only, and that there was no English version of it. The question by me was:

"QUESTION: Okay. And is there also an English version of it on file?

"Answer: No."

What happened after that is that Miss Yniguez has had the opportunity to look at files and refresh her memory and discovered that that statement was incorrect.

THE COURT: Very well. Stipulation is accepted.

(MARIA-KELLY F. YNIGUEZ, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN)

* * *

REDIRECT EXAMINATION

BY MR. POHLMAN:

* * *

Q. And the communication of the governmental act of settling the claim is communicated between claimant in what manner?

A. It can be communicated verbally, in whatever language the claimant understands.

Q. Can -- how about by way of document?



A. I can also communicate it by letter. I can communicate it verbally.

Q. The files that Mr. Ching had you look at after the last hearing, was there a file in which there was a release in Spanish that was signed?

A. Yes. There was one file in which the release, the signed document was in Spanish. I did provide a translation of that document and placed it in the file so that anyone that had to look at the file for whatever reason and was not able to read the Spanish version could know what was contained within. The signed document was in Spanish.

* * *

MR. CHING: . . . The fact is that the witness gave us three files, and in one of which there is a Spanish version which is not -- which is signed and an English version unsigned, but it's there. But in the other two files they were signed versions as to both languages.

THE COURT: I think that's what the Court understands from the testimony and from the stipulation, the only difference being that as I understand the plaintiff's testimony, she prepared the English translation of the Spanish settlement document and placed it in the file so that there would clearly be an English translation.

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

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|---|---|
| MARIA-KELLY F. YNIGUEZ, Plaintiff, vs. ROSE MOFFORD, individually and as Governor of the State of Arizona, ROBERT K. CORBIN, individually and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona, Defendants. | **CIV NO. 88-1854 PHX PGR**<br>**PLAINTIFF'S AND DEFENDANTS' STATEMENT OF STIPULATED FACTS** |

The parties stipulate that in addition to the pleadings, other evidence and documents on file, the following facts are deemed uncontested and may be used by this Court as evidence subject only to relevancy objections:

• • •

8. Kelly is bilingual, fluent and literate in both the Spanish and English languages. Spanish and English are



Kelly's two natural languages. Kelly thinks in both languages and in the course of otherwise unimpeded conversation, naturally alternates between the two languages to appropriately express herself to persons who are able to understand her. She considers the Spanish language to be a part of her cultural heritage.

• • •

11. If Kelly issues an order denying, settling or approving a claim, she is governed by Article XXVIII and must act only in English.

• • •

13. In the prior course of acting for the State of Arizona as a State Service employee, Kelly spoke the English language to persons who speak only English, the Spanish language to persons who speak only Spanish, and a combination of the English and Spanish languages to persons who were able to communicate in both languages. Some of the persons with whom she communicated in a combination of the Spanish and English languages were persons whose command of the English language was not sufficiently well-developed to understand all of the English language expressions and ideas which Kelly desired to communicate. Some of the persons with whom she communicates in the Spanish language also could communicate in the English language, but Kelly communicates in the Spanish language because the emotive ideas and feelings which she desired to express were, in her judgement and the exercise of her liberties, best and most clearly expressed in the Spanish language. In addition, Kelly communicated in the Spanish language to express otherwise inexpressible concepts and ideas.

14. In the course of acting for the State of Arizona as a State Service employee, Kelly has drafted legal settlement documents in both the English and Spanish languages to enable persons who were unable to understand the English language to comprehend the legal import of the document they were signing. She also communicated in the Spanish language pertaining to matters of public interest and importance. Kelly has previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public and private concern.

15. Maria-Kelly F. Yniguez' use of a language other than English in the course of her performing government business contributes to the efficient operation of the State and to the efficient administration of the State.

16. The efficient operation of the State is enhanced by permitting State service employees to communicate with citizens of the State in languages other than English where the citizens are not proficient in English.

17. The efficient administration of the State is enhanced by permitting State service employees to communicate with citizens of the State in languages other than English where the citizens are not proficient in English.

* * *

20. The State of Arizona has adopted specific standards governing the conduct of State Service employees, violation of which "is cause for discipline or dismissal of a State Service employee." Some of these standards are



embodied in Arizona's Administrative Rules and Regulations, including A.C.R.R. R2-5-501.

21. Employees of the State of Arizona who fail to obey the laws of the State of Arizona may be subjected to discipline or dismissal.

22. The regulations of the State of Arizona which require State service employees to comply with State laws and regulations require compliance with the Constitution of the State of Arizona as a part of the laws of the State.

23. The Director of the Department of Administration, Catherine Eden, is responsible, directly or indirectly through persons appointed by the Director, for the enforcement of personnel rules of the State of Arizona.

24. The Department of Administration has the power to impose employment sanctions on Kelly if, in the Department's opinion, she has violated a law, including Article XXVIII.

25. Maria-Kelly F. Yniguez is required by her employer to obey the Constitution and laws of the State of Arizona.

---

ARIZONA

PUBLICITY PAMPHLET

"THE CHOICE IS YOURS"

Propositions to be submitted to the
qualified electors of the State of Arizona
at the

**GENERAL ELECTION**
**NOVEMBER 8, 1988**

GREAT SEAL OF THE
STATE OF ARIZONA
1912

COMPILED AND ISSUED
BY JIM SHUMWAY
SECRETARY OF STATE





ARGUMENT "FOR" PROPOSITION 106

If the United States is to remain a great nation of which we can all be proud, we must have only one official language. We can enjoy many different traditions, cultures, races and languages. However, we must have only one official language for governmental purposes. Without the unifying force of one official language, divisiveness and conflicts are certain to develop.

All patriotic citizens in Arizona will be making a significant contribution toward maintaining our country as a leader in the world of nations when they vote YES on Proposition 106 as an amendment to our state Constitution.

When Arizona citizens cast a YES vote on Proposition 106 it will NOT be denying any non-English speaking person the right to have: 1) an interpreter in an election booth, or: 2) an interpreter in any police action or criminal court of law.

Passage of Proposition 106 will not eliminate bilingual ballots in any official state, county or local elections where required by federal law.

Passage of Proposition 106 will in no way eliminate or discourage the study of foreign languages in our schools. Neither will it disallow the use of any language in conversations in homes, churches or among friends in the private workplace.

Passage of Proposition 106 will permit the continued promotion of bilingual education on all levels of learning in our state where required by federal law.

Passage of Proposition 106 will not eliminate bilingual public notices for the health and safety of our citizens.

The main reason for Proposition 106 is to guarantee that official governmental business, including documents drawn at the state level, as well as business and those documents drawn for all political subdivisions such as counties, cities and towns, shall be valid, effective and enforceable only if conducted and written in the English language.

W.P. Shofstall, Ph.D.
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Former Superintendent of
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FILED
JAN 29 1996
CLERK

No. 95-974

# In the Supreme Court of the United States

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,
PETITIONER,

*v.*

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,
RESPONDENTS.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF IN OPPOSITION OF RESPONDENTS ARIZONANS AGAINST CONSTITUTIONAL TAMPERING AND THOMAS ESPINOSA

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*Attorneys for Respondents Arizonans Against Constitutional Tampering and Thomas Espinosa*

January 29, 1996

## QUESTION PRESENTED

1. Does a state law forbidding state elected officials from communicating with their colleagues and constituents in languages other than English "during the performance of government busines" violate the free speech clause of the first amendment?

## RULE 29.1 STATEMENT

Arizonans Against Constitutional Tampering is a private unincorporated association with no parent or subsidiaries.



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No. 95-974

# In the Supreme Court of the United States

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,
PETITIONER,

*v.*

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,
RESPONDENTS.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF IN OPPOSITION OF RESPONDENTS ARIZONANS AGAINST CONSTITUTIONAL TAMPERING AND THOMAS ESPINOSA

This brief is submitted by Respondents Arizonans Against Constitutional Tampering and its Chairperson Thomas Espinosa in opposition to the Petition for Writ of Certiorari filed with this Court by Arizonans for Official English and its Chairperson Robert D. Park. Respondent Maria-Kelly F. Yniguez is submitting a separate brief in opposition to the petition.

## REASONS FOR DENYING THE PETITION

### I. SUMMARY OF ARGUMENT

Article 28 of the Arizona Constitution provides that "English is the language of the ballot, the public schools and all governmental functions and actions." Ariz. Const., Art. 28, §1(2). Article 28 applies to "the legislative, executive and judicial branches of government," and to "all political subdivisions, departments, agencies, organizations, instrumentalities, local governments and municipalities" of the State, including "all government officials and employees during the performance of government business." *Id.*, §1(3)(a)(iv). Article 28 requires that "[t]his State and all political subdivisions of this State shall act in English and in no other language," and "prohibit[s] this State from using or requiring the use of languages other than English. . . ." *Id.*, §3(1)(a). Based on this uniformly inclusive and specific language, Article 28 is "by far the most restrictively worded official-English law to date." M. Arrington, Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J. L. & Pol., 325, 327 (1991).[1]

After the Governor of Arizona announced her intention to enforce Article 28, a state employee (Maria-Kelly F. Yniquez), a state elected official (Jaime Gutierrez), and a local political action committee (Arizonans Against Constitutional Tampering) consisting of multilingual state elected officials, state employees and citizens of Arizona challenged Article 28 in federal court seeking a declaration that Article 28 violated their rights under the free speech clause of the first amendment and the equal protection clause of the fourteenth amendment. The district court, a three judge panel of the Ninth Circuit, and the

[1] *See also* D. Baron, *The English-Only Question*, 21 ("[A]rticle 28 . . . is the most restrictive of the current wave of official-language laws. . . .") (1990), and J. Crawford, *Hold Your Tongue*, 176 (1992) ("Arizona's [Article 28 is] so far the most restrictive [Official English] measure"). The decision below also compared Article 28 with other Official English laws and acknowledged Article 28's unique breadth. *See* Petitioners' Appendix, 12a (" 'official-English' provisions [outside of Arizona] appear to be primarily symbolic").



Ninth Circuit sitting *en banc* successively declared Article 28 facially invalid on free speech grounds. The Governor of Arizona elected not to appeal from the district court's final judgment after a trial on the merits, and petitioners intervened in order to prosecute an appeal.

Because Article 28 expressly forbids state elected officials and their agents from communicating with their colleagues and constituents in languages other than English "during the performance of government business," the lower courts all concluded that Article 28 abridged "core" political speech in violation of the free speech guarantee of the first amendment. *See New York Times* v. *Sullivan*, 376 U.S. 254, 273 (1963) (the protection of communications between elected officials and members of the public is "central" to the meaning of the first amendment). Accordingly, after a trial on the merits and almost eight years of litigation, three separate adjudicative bodies have considered and rejected petitioners' claims.

It is difficult to recall any recent enactment that rivals Article 28 in its facial unconstitutionality. (The ordinance facially invalidated by this Court on free speech grounds in *R.A.V.* v. *City of St. Paul*, ___U.S. ___, 112 S.Ct. 2538 (1992), is a possible contender.) By declaring that English and "no other language" is "the language of the ballot," Article 28 facially violates the Voting Rights Act of 1965, 42 U.S.C. §1973(4)(f)(1) and (2), as illustrated by this Court's opinion in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). By declaring that English and "no other language" is "the language of the public schools," Article 28 facially violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000(d), as illustrated by this Court's opinion in *Lau* v. *Nichols*, 414 U.S. 563 (1974). Lastly, by proclaiming that English and "no other language" is "the language of all government functions and actions" by state elected officials "during the performance of government business," Article 28 facially violates the first amendment, as illustrated by this Court's unanimous opinion in *Bond* v. *Floyd*, 385 U.S. 116 (1966), uniformly relied on by the courts below in voiding Article 28 on

free speech grounds (but completely ignored by petitioners). *See* Petitioners' Appendix, 26a, 63a and 106a.

In accordance with *Bond* v. *Floyd*, as Judge Brunetti succinctly observed in his concurring opinion in the *en banc* proceeding below,

> Article [28] offends the First Amendment not merely because it attempts to regulate ordinary speech, but because it attempts to manipulate the political process by regulating the speech of elected officials. Freedom of speech is the foundation of our democratic process, and the language restrictions of Article [28] stifle informative inquiry and advocacy by elected officials. By restricting the free communication of ideas between elected officials and the people they serve, Article [28] threatens the very survival of our democratic society.
>
> . . . . .
>
> "The manifest function of the First Amendment in a representative government requires that legislators be given the *widest* latitude to express their views on issues of policy." [Quoting *Bond* v. *Floyd*, 385 U.S.116, 135-36 (1966) (emphasis added).] Elected representatives cannot fully serve their constituents if they are precluded from fully expressing their views to, and learning the views of, those constituents. The First Amendment precludes an electoral majority from restricting political communications [of elected representatives] with a certain segment of the electorate.

Petitioners' Appendix, 63a-64a. This reasoning reflects this Court's settled understanding of "the central meaning of the First Amendment." *New York Times* v. *Sullivan*, 376 U.S. 254 (1963). As the Court recognized in the *Sullivan* case, the first amendment was designed to "secure the widest possible dissemination of information from diverse and antagonistic sources." *Id.* at 266. As the courts below concluded, Article 28



would restrict and homogenize the dissemination of information by restricting the political speech of state elected officials and their constituents in direct violation of this Court's opinion in *Bond* v. *Floyd*.

For these reasons, the decisions of the courts below were correct and need not divert this Court's precious resources by further review.

## II. ARGUMENT

### A. The decision below does not rest on the resolution of the questions presented by the petition, and the questions presented by the petition are based on facts that are outside of the record.

In the "Questions Presented" section of their petition, petitioners state that this case involves "a state employee [who] sought to write government documents in Spanish" and a subsequent declaration that Article 28 is "unconstitutional because it violate[s] the free speech rights of public employees." These issues are not central to the decisions below and are in fact based on factual assumptions outside of the record on appeal.

This is not a case of an errant state employee insisting on communicating in a language not understood by her supervisors, co-workers, or members of the public. As acknowledged by the courts below, Ms. Yniquez spoke Spanish only to members of the public and co-workers who understood and desired to speak in Spanish. *See* Petitioners' Appendix, 46a-47a. Many members of the public to whom Mr. Yniquez spoke Spanish could not understand English. On those few occasions when Ms. Yniquez drafted a document in Spanish, it was always for the benefit of a member of the public who could not understand English, and the document was always reproduced in English. Not only was Ms. Yniquez's use of Spanish in the workplace not disruptive, it enhanced her ability to efficiently perform her official duties. Ms. Yniquez's supervisor accordingly did not object to her use of Spanish, and the State of Arizona admitted that it had no legitimate business purpose in proscribing such speech.

In short, this record simply does not provide the facts required to consider the questions presented by the petition.

Even if this Court were free to assume the requisite facts, the decisions below are not contingent on the resolution the questions presented by the petition and rest on independent grounds. Petitioners' description of this case as involving only the free speech rights of public employees is false. In actuality, the district court, the three judge panel of the Ninth Circuit, and the Ninth Circuit sitting *en banc* all concluded that the fact that Article 28 expressly proscribed the political speech of state elected officials and their agents was enough to declare Article 28 unconstitutional on free speech grounds in accordance with this Court's opinion in *Bond* v. *Floyd.* Petitioners' Appendix, 26a, 36a and 106a. Petitioners' avoidance techniques in this regard are best illustrated by their complete failure to address *Bond* v. *Floyd* in their lengthy petition.

Petitioners' procrustean treatment of the record and the decisions below demonstrates that this case is not an appropriate vehicle for addressing the questions presented by the petition.

**B. The decision below does not announce any new first amendment protections and is consistent with the opinions of this Court.**

The public and private use of languages other than English has been a staple of every era of American history. The United States has been a polylingual nation since its founding, and foreign language communications have constituted "speech" under the first amendment since the Bill of Rights was ratified in December, 1791. As this Court observed over one hundred years ago in *Hurtado* v. *California,* 110 U.S. 516, 530–531 (1884):

> The Constitution of the United States . . . was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of *many tongues.*

(Emphasis added.) The decisions below do not introduce new legal doctrines, but merely acknowledge long-standing rights



that no state has attempted to abridge since the anti-foreign hysteria of the World War I era, culminating in this Court's opinions in *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), *Bartels* v. *Iowa,* 262 U.S. 404 (1923), *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 262 U.S. 404, 410 (1923), *Yu Cong Eng* v. *Trinidad,* 271 U.S. 500 (1926), and *Farrington* v. *Tokushige,* 273 U.S. 284 (1927). In fact, as these (and other) opinions illustrate, Americans have enjoyed a virtually unqualified right to communicate in languages other than English under the first amendment for over two hundred years, and foreign language speech has played an essential role in the development of first amendment jurisprudence.[2]

The polylingualism of the founding era is well–known and has received considerable scholarly attention. Over five hundred Native American languages were spoken in eighteenth century America, and over a quarter of a million German and French speakers had settled in America by 1790. *See* E. Sagarin & R. Kelly, "Polylingualism in the United States of America," in W. Beer & J. Jacob, *Language Policy and National Unity,* 20-43 (1985), and H. Kloss, *The American Bilingual Tradition,* 11-12 (1977). A significant number of African-Americans also spoke various African dialects in early America. *See* J. Blassingame, *The Slave Community,* 25 (1979). As the Pulitzer Prize winning historian Bernard Bailyn has written, "[a]n estimated 10 percent of the pre-Revolutionary population was German-speaking, . . . [and Georgia's] population was so polyglot that a successful magistrate needed to speak fluently in at least three languages and preferably four. . . ." B. Bailyn, *The Peopling of British North America,* 16-17 (1986).

Eighteenth century American polylingualism was not confined to the spoken word or the private sector. In the public

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[2] As this Court observed in *New York Times* v. *Sullivan,* 374 U.S. at 273, the controversy over the Alien and Sedition Acts of 1798 "first crystallized a national awareness of the central meaning of the First Amendment." Hostility to foreign people, foreign ideas and foreign languages gave rise to the enactment of the Acts. *See generally* J. Smith *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties,* 56-58 (1956).

sphere at the national level, the Continental Congress published various official documents in German and French, including the Articles of Confederation and the famous 1774 Address to the people of Quebec extolling the virtues of free speech and self-government. *See* J. Perea, "Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English," 77 Minn.L.Rev. 269, 271 (1992). Official polylingualism was also common at the local level. In eighteenth century Pennsylvania, for example, "[i]n legal action[s] and court proceedings . . ., documents in German were just as valid as those in English." W. Parsons, Representation of Ethnicity Among Colonial Pennsylvania Germans, in *A Mixed Race, Ethnicity in Early America,* 120 (F. Shuffelton, Ed. 1993). Significantly, Pennsylvania was the only state whose constitution had a "free speech" clause when the Bill of Rights was drafted in 1791, and the free speech clause of the first amendment was modeled on the Pennsylvania provision. *See* L. Levy, *Emergence of a Free Press*, 5 (1985).

In the private sector, approximately thirty-eight different German-language newspapers were published in America between 1732 and 1800. *See* K. Conzen, "Germans," *Harvard Encyclopedia of American Ethnic Groups,* 409 (1980). In fact, Benjamin Franklin published one of the first German language newspapers in America in 1732 (the *"Philadelphische Zeitung"*), *see* K. Bartel, "German and the Germans at the Time of the American Revolution, 60 *Modern Language Journal,* 98 (1976), and John Peter Zenger was a "poorly educated German immigrant" who probably spoke more German than English. *See* L. Levy, *Emergence of a Free Press,* 39 (1985).

And of course, the contributions of French, German, African and Native American forces to American Revolutionary War effort were essential to the birth of our Nation.[3]

Based on the express and unqualified language of the free speech clause itself, coupled with the pervasive official and

[3] The official use of Navajo as a military secret-code also helped to preserve the Nation in World War II.



private use of foreign language speech in late eighteenth century America, it is improbable that the framers and ratifiers of the first amendment did not intend to include foreign language speech within the free speech and press provisions of the first amendment. As a leading scholar in the history of American multilingualism has noted, "early political leaders recognized the close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on these freedoms." S. Heath, Language and Politics in the United States, in *Linguistics and Anthropology,* 267, 270 (1977).

This conclusion is poignantly illustrated by the fact that one of the most definitive official expressions of the original understanding of the freedom of the press is contained in a 1774 proclamation *in French* issued by the Continental Congress to the people of Quebec in an attempt to procure *Quebecois* support for the American Revolution. *See* D. Anderson, The Origins of the Press Clause, 30 UCLA 455, 463-464 (1983). The English language version of the Address states:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and the arts in general, in its diffusion of liberal sentiments on the administration of Government, in its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs.

1 *Journal of the Continental Congress,* 108 (1774). The fact that the first American government engaged in official communications in languages other than English regarding matters of public concern indicates that they considered such communications as falling within the realm of free speech. The framers' acceptance of polylingualism is also reflected in the national motto which they adopted for the Nation—"*E pluribus unum.*"

The free speech tradition of the original framers was respected by the framers of the Civil War amendments. For instance, Representative Thaddeus Stevens of Pennsylvania, the head of the House delegation to the Joint Committee on Reconstruction that officially reported the fourteenth amendment, explained that the Reconstruction legislation passed pursuant to section two of the thirteenth amendment was designed to assure that "all laws be impartial, *without regard to language,* race or former condition." Quoted in D. Donald, *The Politics of Reconstruction, 1863-1867,* 58 (1965) (emphasis added). This understanding reflects the pervasive nature of foreign language speech in the Civil War and Reconstruction eras. In fact, in his unsuccessful 1858 senatorial campaign against Stephen Douglas, Abraham Lincoln had his famous "House Divided" speech (among others) translated into German in order to appeal to Illinois's influential German constituency. *See* D. Donald, *Lincoln,* 211, 231 (1995). The polylingualism of this foundational era of American constitutional history is also illustrated by the publication of Minnesota's constitution of 1857 in English, German, Swedish, Norwegian and French. See J. Crawford, *Hold Your Tongue,* 44 (1992).

The framers' decision not to distinguish between English and non-English speech for first amendment purposes is also reflected by the majority and dissenting opinions in the case that many scholars identify as the starting point of modern first amendment jurisprudence, *Abrams* v. *United States,* 250 U.S. 616 (1920). In *Abrams,* several Russian Jewish emigres challenged their convictions under the Espionage Act of 1917 as violative of their rights under the first amendment based on the fact that the only evidence of "espionage" consisted of distributing leaflets in English and Yiddish condemning America's involvement in the Russian Revolution. Although the Court directly considered (and translated) the Yiddish leaflet in *Abrams,* both the majority opinion by Justice Clarke and the



dissenting opinion by Justice Holmes treat the two languages as standing on equal footing for first amendment purposes.[4]

This Court has also expressly concluded that choice of language is protected by the first amendment. In *Cohen* v. *California,* 403 U.S. 15, 24 (1971), this Court considered whether a person could be punished for wearing a shirt bearing the words "fuck the draft" in the Los Angeles County Courthouse. In concluding that choice of words was protected by the free speech clause, the Court reasoned that:

> We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expressing of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

*Id.* Although Mr. Cohen could have easily chosen to use less provocative terms, the Court acknowledged that the first amendment protected the "emotional impact" of words in addition to their "cognitive content." *Id.*[5]

As the Ninth Circuit understandably concluded, if a speaker has a free speech right to use profanity under *Cohen,* a speaker

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[4] The Court also considered foreign language speech in the free speech context in *Frohwerk* v. *United States,* 249 U.S. 616 (1919), and *Schaefer* v. *United States,* 251 U.S. 466 (1922), both of which involved the question of whether speech published in German-language newspapers (the *"Missouri Staats Zeitung"*, the *"Philadelphia Tageblatt"* and the *"Philadelphia Sonntagsblatt"*) violated the Espionage Act of 1918. Like the Court in *Abrams,* although the Court carefully translated the speech in question from German to English in each case, it did not state or suggest that such speech did not constitute speech under the first amendment.

[5] This Court has also protected choice of language under the first amendment in the following cases involving profanity: *Gooding* v. *Wilson,* 405 U.S. 518 (1972), *Rosenfeld* v. *New Jersey,* 408 U.S. 901 (1972), *Lewis* v. *New Orleans,* 408 U.S. 913 (1972), and *Brown* v. *Oklahoma,* 408 U.S. 914 (1972).

*a fortiori* has a free speech right to use a language other than English (especially in those circumstances in which the speaker is unable communicate in English). *See* Petitioners' Appendix, 29a-30a. Correspondingly, as the Ninth Circuit also concluded, if a private citizen's right to engage in foreign language communications cannot be restricted consistent with the first amendment, neither can a state elected official's. *See Bond* v. *Floyd,* 385 U.S. 116, 132-33 (1966) (state may not impose stricter First Amendment standards on legislators; elected officials must "be given the widest latitude to express their views on policy").

Article 28's facial unconstitutionality is perhaps most aptly illustrated by this Court's opinion in *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 262 U.S. 404, 410 (1923), which was consolidated with this Court's decision in *Bartels* v. *Iowa,* 262 U.S. 404 (1923). In *McKelvie,* this Court considered an action to enjoin the Governor and Attorney General of Nebraska from enforcing a 1921 Nebraska statute which provided that:

> The English language is hereby declared to be the official language of this State, and all official proceedings, records and publications to be in such language and all the common school branches shall be taught in said language in public, private, denominational and parochial schools.

*Id.* at 411, n.3. This statute repealed the statute previously voided by the Court in *Meyer* v. *Nebraska. Id.* The statute is remarkably similar to Article 28 and was voided in its *entirety* by the Court based on its reasoning in *Meyer.*[6]

This Court's longstanding refusal to distinguish between different languages for first amendment purposes is also in accord with the protection of "symbolic" speech under the free

[6] Although *Meyer, Bartels* and *McKelvie* were decided on substantive due process grounds before the development of modern free speech jurisprudence, this Court subsequently characterized *Meyer* as a first amendment case in *Griswold* v. *Connecticut,* 381 U.S. 475, 482 (1965). Moreover, Justice Brandeis, who joined the majority opinion in *Meyer* without separate comment, later indicated that he based his decision on the "right to . . . utter speech." *See* M. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 Sup. Ct. Rev. 299, 320.



speech clause. In fact, in the first case in which this Court voided a law on free speech grounds, the "speech" consisted of the mere display of a red flag without any attendant verbal communications. *See Stromberg* v. *California,* 283 U.S. 359 (1931). Indeed, the fact that foreign language use involves "pure speech" (i.e., only words with no conduct) mandates that it be subject to even greater protection than that enjoyed by "symbolic" speech (i.e., speech plus conduct).

Lastly, but perhaps most importantly, by proscribing an entire category of core political speech by state elected officials, be it in Spanish, American Sign Language, Braille or any other non-English language , Article 28 undermines the fundamental purpose of the first amendment—to guarantee "the free communication of ideas between elected officials and the people they serve. . . ." Petitioners' Apendix, 63a (Brunetti, J., concurring, citing *Bond* v. *Floyd,* 385 U.S. 116, 136-37 (1966)). Article 28 thus stands in conspicuous opposition to this Court's foundational first amendment jurisprudence.

In sum, the decisions below do not announce new constitutional rights. To the contrary, petitioners' clearly seek reversal of *Meyer* v. *Nebraska, Nebraska District of Evangelical Lutheran Synod* v. *McKelvie, Bond* v. *Floyd, Pickering* v. *Board of Education,* and *Cohen* v. *California* and completely ignore the principle of *stare decisis.*

### C. The decision below does not conflict with the law of other Circuits.

The decision below is based on an unusual state law and peculiar facts. It does not conflict with the law of any other Circuit. Because this is an action involving the free speech rights of elected officials and other public servants, the cases cited by the petition involving private employers arising under Title VII of the Civil Rights Act of 1964 are inapposite. Nor

does this case implicate any right to multilingual government services. Respondents requested relief only from a prior restraint of free speech.

Based on the absence of conflicting opinions on these issues in the lower courts, this case is inappropriate for certiorari.

**D. The decision below is consistent with federalism.**

Petitioners argue that this Court should reverse the decision below because it "hinders federalism." Petition, 21. However, the two highest ranking elected officials of the State of Arizona—the Governor and the Attorney General—have both elected not to appeal from the lower courts' decisions or otherwise participate in this proceeding (even if only to urge that Article 28 be submitted to the Arizona Supreme Court for interpretation). They are the individuals that the people of Arizona selected to defend the interests of the State before this Court, not petitioners. Given the fact that the highest elected officers of the State of Arizona have acquiesced in the lower courts' decisions, the interests of federalism require that this Court not intervene in this case to upset a six year status quo. In fact, the only threat to federalism in this case is petitioners' invitation for this Court to rewrite Article 28.

**E. This case does not involve circumstances worthy of certiorari.**

The outcome of this case was contingent on a uniquely restrictive state enactment which the State itself has elected not to defend. Although this case is important to the parties to this proceeding, the decisions below do not establish rules of general applicability or importance to the legal system of the Nation as a whole. They instead reflect eight years of painstaking efforts by the lower courts to apply well–settled first amendment principles to an exceptionally peculiar and complex factual context impacting a single locality. Reflecting the unusual nature of both the language of Article 28 and the underlying material facts, no inconsistency with precedent has been shown. Given the fact that twenty other states have enacted laws declaring English as their official language, if this issue is



really as worthy of certiorari as the petition claims, other circuits will surely consider the issue in the future and provide this Court with a complete record by which to consider the question. The absence of any litigation on this issue arising outside of Arizona when such laws have been on the books for years demonstrates the unique nature of Article 28 and its purely local impact. The petition merely seeks reversal of a narrowly tailored decision adverse only to petitioners and is thus inappropriate for certiorari.

## CONCLUSION

For the foregoing reasons, this Court should deny the Petition For a Writ of Certiorari in this matter.

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January 29, 1996

Supreme Court, U.S.
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No. 95-974

# In The Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Petition for a Writ Of Certiorari to the United States Court of Appeals for The Ninth Circuit

## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 8, 1996

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## REPLY

### I. Respondents' "Public Concern" Test Conflicts With *Pickering*, *Rosenberger* and Other Decisions of this Court.

Respondents concede that "no one doubts the government's power to deliver a particular message or to regulate the content of its own speech." Opposition of Respondent Maria-Kelly Yniguez ("Yniguez Opp."), 15. Nevertheless, like the majority below, they propose that government's power be subject to a balancing test under *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education*, 391 U.S. 563 (1968). Yniguez Opp., 16.

This Court's most recent explanation of the government's own speech rights was in *Rosenberger v. Rector and Visitors of Univ. of Va.*, __ U.S. __, 115 S.Ct. 2510 (1995). Nowhere in *Rosenberger* does this Court suggest

that a balancing test be employed where the government is the speaker. Moreover, in *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. __, 115 S.Ct. 2440, 2449 (1995), this Court noted that the government **does not risk** a free speech violation when it restrains **its own speech**. "[The government] would be liable for suppressing free exercise or free speech (a risk not run when the State restrains only its *own* expression)." *Id.*, (emphasis in original).

Since, under these cases, employees have no "personal stake in the words they utter when they speak for the government," App. 89a (Kozinski, J.), there is nothing to balance. Thus, the majority below's use of a balancing test conflicts with *Rosenberger* and *Capital Square* and should be reviewed.

Even if a balancing test were used, however, respondents' proposal would conflict with *Pickering*. If everything a public employee says to the public is a "matter of public concern," the *Pickering* test would forbid the government from prescribing how a public employee is to interact with the public. But *Pickering* does not require that government permit employees to deal with the public in any fashion they see fit. *See, e.g., Waters v. Churchill*, __ U.S. __, __, 114 S. Ct. 1878, 1886 (1994)(O'Connor, J., plurality op.)("[S]urely a public employer may . . . prohibit its employees from being 'rude to customers' . . . "). This Court should review this interpretation of *Pickering*.[1]

1 One commentator suggests it is the recipients of government services whose rights should be balanced in this case. Scott H. Angstreich, *Speaking in Tongues: Whose Rights At Stake?*, 19 Harv. J.L. & Pub. Pol'y 634, 640 (1996). Such an analysis would conflict with *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 466 (1979)(per curiam)(disagreement with public policy is to be registered at the polls).



## II. The Effect of the Decision Below Is Widespread.

Respondents suggest that Arizona's Official English provision is "singularly unique . . . completely atypical and totally dissimilar," Yniguez Opp. 20, with a "purely local impact." Opposition of Arizonans Against Constitutional Tampering ("AACT Opp."), 15. In fact, Arizona's provision may be more detailed, but it is hardly unique.

Other State laws are similar in effect. For example, one of the newest State Official English declarations is New Hampshire's. 1995 N.H. Laws 157, *reprinted in* Appendix hereto ("Reply App."), 2A. The law is not like a declaration of a state folk dance, as Respondent Yniguez suggests. Yniguez Opp. 3, n. 2. Otherwise why would the Governor insist on an "exemption for public proceedings occurring between the State of New Hampshire and the Province of Quebec, instruction in foreign language courses in our education system, the promotion of international commerce," and so on? Gov. Stephen Merrill, Statement, May 31, 1995, 1, *reprinted in* Reply App., 5A.

As shown in the record of this case, the decisions below have already affected the political considerations of official English proposals in several states. Declaration of Cameron Whitman, May 3, 1990, ¶ 5 ("The effect of these [District Court] decisions has been to slow, and in at least one case, halt, progress on similar legislative proposals in other states"), *attached* to Motion for Expedited Consideration Under 28 U.S.C. § 1657 in Ninth Cir. No. 90-15546. Similarly, several amici indicate that the decision below will affect political efforts in Congress and the states. *See, e.g.*, Brief of the Washington Legal Foundation, et al., pp. 5-7; Brief of FLA-187 Committee, et al., pp. 1-2. In addition, as demonstrated by an opinion letter from California's Legislative Counsel to a member of the

state Assembly, *reprinted* in the Appendix hereto, current Official English proposals are being stifled by reference to the decision below. Reply App., 8A.

### III. Respondents' Factual Complaints Are Misplaced.

Respondents complain that the Petition "distort[]s" the record and ignores the majority below's factual findings and certain stipulations entered into during discovery in 1988. Yniguez Opp. 4-8; AACT Opp. 5-6 ("procrustean treatment of the record"). Yet Respondents misunderstand the nature of this Court's factual inquiry on a constitutional review. Last term, this Court noted in *Hurley v. Irish-American Gay Group of Boston*, __ U.S. __, 115 S.Ct. 2338, 2344 (1995), that "[o]ur review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court."

Nor does this Court permit stipulations between parties to impede its examination of a law's constitutionality. *See, e.g., Lee v. Weisman*, 505 U.S. __, __, 112 S.Ct. 2649, 2659 (1992)("we shall not allow the case to turn upon this point" when stipulation that graduation was voluntary was offered to excuse Establishment violation).[2]

2 Even absent collusion between parties, determining constitutional issues based on early discovery responses may be difficult: Ms. Yniguez testified that she had entered into settlement agreements on behalf of the State in Spanish, a language which her supervisor and auditing agency could not understand. Reporter's Transcript of Proceedings ("RT"), February 13, 1989, Pp. 71-72. Counsel for Respondent Yniguez, trying to clarify the testimony, admitted that: "there is an instance which is agreed to in the stipulation where the only release that is signed by the claimants is in Spanish", although Ms. Yniguez prepared a translation. RT. April 27, 1989, p. 14. It is unclear whether the State knew this at the time it entered into the stipulation. RT, March 26, 1990, p. 46 (Mr. Ching for the State: "[W]e never said it's okay for her to sign the releases.").



The facts in this case are clear and unambiguous. For her own reasons, Ms Yniguez spoke and wrote in Spanish during the performance of her official duties. "Some of the persons with whom she communicates in the Spanish language also could communicate in the English language, but Kelly [Yniguez] communicates in the Spanish language because the emotive ideas and feelings which she desired to express were, *in her judgement* [sic] *and the exercise of her liberties*, best and most clearly expressed in the Spanish language." Plaintiff's and Defendants' Statement of Stipulated Facts ("Stipulations"), ¶ 13 (emphasis added). Similarly, Ms. Yniguez "has previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public *and private concern*." Stipulations, ¶ 14 (emphasis added). Thus, even accepting stipulations, the facts in this case are clear and sufficient for this Court's review.

### IV. The Majority Decision Below Implicates Tenth Amendment Issues:

Respondent Yniguez suggests that this Court not consider the Tenth Amendment and notions of federalism since they were not raised explicitly below. Yniguez Opp. 19. This suggestion is unwise. The Petition points out that the majority decision below, resting on a novel interpretation of the First Amendment, implicates Tenth Amendment issues. Petition, 21-22. The case on which Ms. Yniguez relies, *Capital Square*, 115 S.Ct. at 2445, prohibits only discussion of issues other than those on which cer-

tiorari was granted; it does not require silence on issues implicated by decisions below.

### V. The Founders Never Intended the First Amendment to Permit Public Employees to Ignore Government's Chosen Language.

Respondent AACT claims that "early political leaders recognized the close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on these freedoms." AACT Opp., 6-11, 9, *quoting*, Shirley Brice Heath, "Language and Politics in the United States," in *Linguistics and Anthropology* (1977). At best, AACT's (and Heath's) historical analysis is incomplete.

During the Revolutionary War era, a nation's language was thought to be the essence of national culture. As Professor Simpson put it: "Language, in other words, is seen from the start as a potential element in constituting a political and cultural unity among the citizens of the new republic; or, if it goes wrong, a means of prescribing or perpetuating disorder." David Simpson, *The Politics of American English, 1776-1850*, 30 (1986) ("Simpson").

Hobbes wrote in 1651 that language was the major organizing principle of states and without it "there had been amongst men, neither Commonwealth, nor Society, nor Contract, nor Peace". T. Hobbes, *Leviathan*, 12 (1973 ed.). Locke wrote: "For Words, especially of Languages already framed, being no Man's Private possession, but the common measure of Commerce and Communication, 'tis not for any one, at pleasure, to change the Stamp they are current in." John Locke, *An Essay Concerning Human Understanding*, 512 (Nidditch Corr. Ed., 1979).

Long before the Revolution, the primacy of English was established. "[T]he English language dominated all



public life. It was the only official language and as such was used in the courts, the assemblies, and the press." J.R. Pole, *Foundations of American Independence: 1763-1815*, 18 (1972).

In 1780, John Adams wrote to the President of Congress, arguing that just as forms of government have an influence on language, so "language in its turn influences not only the form of government, but the temper, the sentiments, and manners of the people." John Adams, *The Works of John Adams*, Vol. 7, p. 249 (Charles Francis Adams ed., 1852). Adams suggested that the Americans should "force their language into general use". *Id.*, 250.[3]

The desire to maintain a common language can also be seen in *The Federalist, No. 2*, (John Jay) 94 (Benjamin F. Wright ed., 1961): "Providence has been pleased to give this one connected country to one united people — a people descended from the same ancestors, **speaking the same language**. . . A strong sense of the value and blessing of union induced the people at a very early period to institute a federal government to preserve and perpetuate it." (emphasis added).

Respondent AACT finds Pennsylvania's experience significant. AACT Opp., 8. James Wilson's speech on December 11, 1787, in the Pennsylvania Ratifying Convention illustrates the language beliefs of many Founders: "That language, sir, which shall become most generally known in the civilized world, will impart great importance over the nation that shall use it. The language of the United States will, in future times, be diffused over a greater extent of country, than any other that we now

3 In 1806, Daniel Webster, an active language revolutionary, predicted that, by 1940, more people would speak English than any other language, "not excepting the Chinese." Simpson, 66.

know." Library of America, "Debates on the Constitution," (1993), Vol. I, 866.

Thus, whether or not it was "improbable" that the Founders intended *private* choice of language to be covered by the First Amendment, AACT Opp., 8-9, it was *highly* unlikely that the Founders intended the First Amendment to permit a public employee to ignore an official language. To allow an individual employee to override a democratically-made choice of language for government would have ignored the natural course of American development and invited disaster.

## CONCLUSION

This Court should grant the Petition and issue the Writ of Certiorari.

Respectfully Submitted,

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No. 95-974

# In The
# Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Petition for a Writ Of Certiorari to the
United States Court of Appeals for The Ninth Circuit

## APPENDIX TO REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## CHAPTER 157

## HOUSE BILL - FINAL VERSION

0111L
95-0066
10/02

## HB 326-FN-LOCAL

## STATE OF NEW HAMPSHIRE

**In the year of Our Lord**
**One Thousand Nine Hundred and Ninety-Five**

## AN ACT

requiring that all governmental business be conducted in English.

Be it Enacted by the Senate and House of Representatives in General Court convened:

157:1 *New Chapter; Official Language of New Hampshire.* Amend RSA by inserting after chapter 3-B the following new chapter:

### CHAPTER 3-C

### OFFICIAL STATE LANGUAGE

**3-C:1Official State Language.**

I. The official language of the state of New Hampshire shall be English. English is designated as the language of all official public documents and records, and of all public proceedings and nonpublic sessions.

II. For the purposes of this chapter, "official public documents and records" are all documents officially compiled, published, or recorded by the state.



III. For the purposes of this chapter, "public proceedings and nonpublic sessions" mean those proceedings and sessions as defined in RSA 91-A, and includes the information recorded at such proceedings and sessions.

3-C:2 *Exceptions.* The provisions of this chapter shall not apply:

I. To all public proceedings between the state of New Hampshire and the province of Quebec when, in the opinion of the state administrator involved in such proceedings, it may be necessary to conduct such proceedings between Quebec and New Hampshire wholly or partially in French, and to use official public documents and records during the public proceedings, which are written wholly or partially in French.

II. To instruction in foreign language courses, or other requirements of the state university system.

III. To instruction designed to aid students with limited English in a timely transition and integration into the general education system.

IV. To the promotion of international commerce, tourism, and sporting events.

V. When deemed to interfere with needs of the justice system.

VI. When the public good, public safety, health, or emergency services require the use of other languages.

VII. When expert testimony or witnesses may require a language other than English; provided, however, that for purposes of deliberation, decision making, or record keeping, the official version of such testimony or commentary shall be the officially translated English-language version.

3-C:3 *Employment.* No person shall be denied employment with the state or with any political subdivision of

the state based solely upon that person's lack of facility in a foreign language, except when related to bona fide job needs reflected in the exceptions listed in RSA 3-C:2.

3-C:4 *Construction*. This chapter shall not be construed in any way to infringe on the rights of citizens under the state constitution or the constitution of the United States in the use of language in activities or functions conducted in the private sector. No agency or officer of the state or of any political subdivision of the state shall place any restrictions or requirements regarding language usage for businesses operating in the private sector other than in official documents, forms, submissions, or other communications directed to governmental agencies and officers, which communications shall be in English as recognized in this chapter.

157:2 *Effective Date*. This act shall take effect 60 days after its passage.

Approved:June 1, 1995

Effective:July 31, 1995



**STATE OF NEW HAMPSHIRE**

**OFFICE OF THE GOVERNOR**

STEPHEN MERRILL

GOVERNOR

May 31, 1995

Today I have signed House Bill 326, intending to promote the use of English in conducting governmental business. I sign this bill to bring people together, not divide them. As with our proud French-Canadian neighbors who promote the usage of French, I trust that emphasis on the words we speak publicly may encourage our private reflection on the content of our words as well.

This bill raises the question as to whether we need to underscore national unity and societal cohesiveness with English language usage. It is language that crosses our ethnic, racial, national, and religious lines and allows diverse citizens to share their various cultural backgrounds. Having a common language allows all citizens to participate fully and equally in democracy, to share viewpoints, debate differences, and eliminate feelings of misunderstanding, isolation, and distrust.

I have insisted upon an exemption for public proceedings occurring between the State of New Hampshire and the Province of Quebec, instruction in foreign language courses in our education system, the promotion of international commerce, tourism, and sporting events, the administration of the judicial system, and when the public good, public safety, help, or emergency services require the use of other languages.

While the importance of multilingual individuals cannot be overstated, our taxpayers' money would be better

spent in increasing our instruction of the English language to new immigrants rather than duplicating government in multiple languages. The interest in a common language is supported by citizens from broad backgrounds, many of whom come from countries with official language laws and understand the necessity of a common language. English is our common language, not our universal language. Remembering that distinction will bring us together, not separate us.

Our interest in unifying our citizens through the use of our national language, English, does not discourage diversity. I will conduct State business in French, Spanish, and any other language that is appropriate under the circumstances. I hope native languages and dialects will be spoken in the home, at public events, and at other gatherings. They add to our rich culture and acknowledge our heritage.



It shall be clear that by passing this law, we do not limit State government in its efforts to support and encourage commerce with foreign nations and their citizens. New Hampshire has worked hard to promote international trade and to improve relationships with our Canadian neighbors in Quebec, among others. We hold those relationships dear, and they will grow in the coming years.

As the Governor to lead the first trade mission to Quebec, I learned the value of unrestrained communication between nations and people. As I announced then, New Hampshire Departments now require one member of each agency to speak French to French-speaking business people and citizens in an effort to acknowledge the strong relationship with the Province of Quebec. We will continue to do so.



This bill attempts to ensure that New Hampshire citizens and New Hampshire state government conduct most business through our common language. Some will find it curious that such a bill is even necessary. Once, speaking English was a desired goal, one that promoted communication, understanding, and assimilation. Our State has distinguished itself for over 200 years by successfully welcoming people from different culture. This bill will maintain that tradition in our State.

/s/

Stephen Merrill

Governor

**LEGISLATIVE COUNSEL OF CALIFORNIA**

**BION M. GREGORY**

Sacramento, California
January 23, 1996

Honorable Bob Margett

6028 State Capitol

English as the Official State Language - #455

Dear Mr. Margett:

Pursuant to your request we have prepared the enclosed measure relating to English as the official state language.

The proposed measure, if enacted, would require the state and its political subdivisions, among other things (1) to take all reasonable steps to preserve, protect, and enhance the role of the English language as the official language of the state, and (2) to provide that the state and its political subdivisions shall not be required to act in any language other than English. Hence, the proposed measure, if enacted, may infringe upon speech protected by the First Amendment to the United States Constitution and Section 2 of Article I of the California Constitution (*Yniguez v. Arizonians* [sic] *for Official English* (9th Cir.), 69 F. 3d 920).

If you wish further assistance with this measure, please contact the undersigned deputy.

Very truly yours,

Bion M. Gregory

Legislative Counsel

By: Diana G. Lim

Deputy Legislative Counsel

MOTION FILED

JAN 22 1996

No. 95-974

# In The
# Supreme Court Of The United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH
AND ROBERT D. PARK,

*Petitioners,*

v.

STATE OF ARIZONA;
MARIA-KELLEY F. YNIGUEZ; JAIME
GUITIERREZ; AND ARIZONANS
AGAINST CONSTITUTIONAL TAMPERING,

*Respondents.*

**On Petition for a Writ Of Certiorari to the United States Court of Appeals for The Ninth Circuit**

## BRIEF *AMICUS CURIAE* OF U.S. ENGLISH, INC., IN SUPPORT OF PETITIONER

Leonard J. Henzke, Jr.
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January 22, 1996

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9800

**MOTION FOR LEAVE TO FILE**
**BRIEF *AMICUS CURIAE***
**IN SUPPORT OF PETITION FOR CERTIORARI**

COMES NOW U.S. English Inc. ("U.S. English"), by counsel, pursuant to Supreme Court Rule 37, and moves this Court for leave to file a brief *amicus curiae* in support of the Petition for Certiorari filed by Arizonans for Official English on December 20, 1995. In support of this motion, U.S. English states as follows:

1. U.S. English has approximately 600,000 members nationwide, and worked to obtain enactment of Article XXVIII of the Arizona Constitution (the "Amendment") at issue here.

2. U.S. English filed briefs *amicus curiae* in the Court of Appeals in this case.

3. U.S. English is currently promoting similar provisions in numerous other jurisdictions, including H.R. 123 in the U.S. Congress.

4. A threshold issue in any case involving the First Amendment is the scope of the court's power of constitutional adjudication.

2. Petitioner's brief discusses briefly the principle of constitutional adjudication that the Arizona constitutional provision in issue must be given all reasonable constructions in order to save it from facial invalidation. The *amicus brief* submitted by U.S. English discusses this principle in greater detail, especially as applied to the Constitutional provision here, which was enacted by referendum.

3. The amicus curiae brief submitted herewith also discusses in greater detail the authoritative construction of the Arizona Constitutional Amendment in issue, and the error of the majority opinion below in ignoring this construction. A copy of the formal Opinion of the Attorney General is printed with our brief. We understand that the Arizona Attorney General

does not intend to file a brief respecting the Petition, so it is particularly important that the Court have available a discussion and copy of the Opinion of the Attorney General and his formal position before the Court of Appeals.

3. Barnaby W. Zall, Esq., counsel for Petitioner Arizonans for Official English, does not consent to this motion.

4. All other parties consent to this motion.

WHEREFORE, it is requested that the Court issue an order granting U.S. English leave to file the attached *amicus curiae* brief in support of the Petition for Certiorari.

Respectfully submitted,

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## BRIEF OF AMICUS CURIAE U. S. ENGLISH, INC. IN SUPPORT OF PETITIONER

### I. STATEMENT OF INTEREST OF AMICUS CURIAE

U.S. English is a national nonprofit organization with over 600,000 members. Its purpose is to promote legislation and programs to establish English as the official language of governments.

U.S. English has a substantial interest in this litigation because it involves the constitutionality of Article XXVIII of the Arizona Constitution, entitled "English as the Official Language" (the "Amendment"). U.S. English assisted in the initiative which resulted in the Amendment, filed briefs in the Court of Appeals below, and is currently promoting official English statutes in Congress and other states.

Any meaningful official English statute must necessarily employ broad language and rely heavily on administrative interpretations and implementations by attorneys general or other administrative officials. The lower courts' refusal to give effect to the Amendment's construction by the Arizona Attorney General, and their facial invalidation of the Amendment, will make it extraordinarily difficult to fashion similar legislation in other jurisdictions if the opinion below is allowed to stand.

U.S. English respectfully submits that Judge Reinhardt's majority opinion below is in direct conflict with prior decisions of this Court which held that facial invalidation is not appropriate, where, as here, the challenged provision has a broad range of plainly legitimate applications. The lower courts should have adopted the careful opinion of the Arizona Attorney General which narrows the scope and impact of the Amendment and cures all constitutional concerns. In the alternative, the lower courts should have certified the case to the Arizona Supreme Court for an authoritative construction of the Amendment before ruling on its constitutionality. We suggest that the Arizona

Atttorney General be invited to file a brief before the Petition for Certiorari is acted upon.

## II. ARGUMENT

### A. The Opinions of the Lower Courts Are In Conflict With Decisions of This Court Proscribing Facial Invalidation

The opinion below erred in ruling that the entire Amendment was facially invalid. No application of the Amendment was saved -- even admittedly Constitutional provisions such as that requiring use of English in court opinions and similar official documents. In so holding, the majority opinion below conflicts with numerous Supreme Court opinions, which have consistently held that in a case such as this one, where the challenged statute has a broad range of legitimate applications, the more appropriate remedy is to restrict the scope of the statute to cure any constitutional infirmities.

Facial invalidation of a statute challenged on constitutional grounds is "the exception" and "has been employed by the Court sparingly and only as a last resort." *Broadrick v. State of Oklahoma*, 413 U.S. 601, 613, 615 (1973). Courts must exercise caution and restraint in considering a facial challenge so as to avoid "unnecessary interference" with a state's policy choices. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

Facial invalidation is only proper where the threat of unconstitutionality is both *real* and *substantial* when compared to the statute's legitimate sweep. *Broadrick*, 413 U.S. at 615. Only if the "overbreadth of the . . . statute, in relation to its legitimate reach, is substantial" will it "warrant a declaration of facial invalidity". *Brockett v. Spokane*, 472 U.S. 491, 503 fn. 12 (1985). The Court is reluctant to invalidate a statute in its entirety when the challenged law has at least some legitimate application. *See Broadrick*, 413 U.S. at 616-17. In these circumstances, the more appropriate remedy is partial invalidation. *See Marsh v. Alabama*, 326 U.S. 501 (1946) (invalidating state trespass law, but only insofar as it applied to the distribution of literature on the streets of a company town). *See also Brockett*, 472 U.S. at 502-3 (listing First Amendment cases where statute was held invalid only as applied to particular persons or circumstances).



Moreover, the Court will not entertain a facial challenge when a narrower remedy will fully protect the litigants. In *U.S. v. National Treasury Employees Union*, __ U.S. __, 115 S.Ct. 1003 (1995), a class of plaintiffs composed of all Executive Branch employees below GS-16 challenged the constitutionality of a statute that placed a ban on federal employees receiving honoraria for speeches. *Id.* at 1010. The lower courts held that the statute violated the First Amendment and issued an injunction against enforcement of the statute against *any* executive branch employee. *Id.* at 1011-12. This Court agreed that the statute was invalid as applied to the plaintiff class; however, the Court reversed the judgment of the lower court in so far as it purported to invalidate the statute as applied to the *entire* executive branch. *Id.* at 1018-19. The Court reasoned that "although the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." (internal citations omitted) *Id.* at 1018. The Court noted that the activities and status of non-parties might be quite different from those of the plaintiff class. *Id.* at 1019.

The declaratory judgment issued below is manifestly overbroad under the standards set forth in *Broadrick* and *National Treasury Employees Union*. Facial invalidation is not appropriate, where, as here, the challenged statute has a wide range of legitimate applications. For example, there is no question that the Arizona Amendment is constitutional in requiring all official

government documents to be prepared in English, and requiring all court and administrative hearings to be conducted in English or with English translation.

The fact that the Amendment employs broad language is not sufficient to strike it down *in toto*. Indeed, constitutional provisions -- including the federal First and Fourteenth Amendments -- are necessarily broad and require interpretation by courts and state officials to define their scope and application. The courts should not assume that Arizona officials will implement the Amendment in ways which will conflict with the federal Constitution or federal law, particularly where, as here, the State's Attorney General has issued a lengthy opinion narrowly interpreting the Amendment and repeatedly stating that the Amendment must be read so as not to conflict with the federal Constitution, federal laws, or other State Constitutional provisions. *See* Opinion of Arizona Attorney General ("O.A.G.") I89-099 reprinted as Appendix A, *infra*, at A-1 , A-3, A-4, A-7, A-8 thru A-10, A-12.

Facial invalidation is not necessary to protect the litigants in this case. The present action was instituted by two individual plaintiffs. At the time the lawsuit was filed, plaintiff Yniguez was employed by the Risk Management Division of the Arizona Department of Administration, where she handled malpractice claims asserted against the State. Yniguez alleged that the Amendment prevented her from speaking Spanish to Spanish speaking claimants. Similarly, plaintiff Guitterez, a state senator, claimed that the Amendment prevented him from speaking Spanish to his Spanish-speaking constituents. Even assuming the Amendment prohibited the speech of Yniguez and Guitterez and others similarly situated, the court could have protected the party plaintiffs by fashioning a far narrower remedy. Indeed, the Arizona Attorney General filed an opinion with the district court interpreting the Amendment to apply only to "official" acts or government functions. *See* O.A.G. I89-099, Appendix A,



*infra*, at A-2. Adoption of the Attorney General's opinion would have saved the Amendment from total invalidation while fully protecting the party plaintiffs.[2]

The Court's decisions narrowly restricting facial invalidation are not simply procedural, but rather constitute a fundamental principle necessary for the proper balancing of powers in a representative democracy, including the relationship of judicial and legislative powers. The majority opinion below egregiously disrupts that balance, by substituting the views of several judges regarding the official language of state government, in place of a state constitutional provision, approved by a majority of Arizona voters and carefully implemented by an opinion of the elected State Attorney General. The majority opinion below affects millions of Arizona citizens and their relation to their government, and warrants review by this Court.

### B. The Lower Courts Disregarded This Court's Decisions in Refusing To Adopt The Narrowing Construction Proffered By The Arizona Attorney General

Shortly after the Official English Amendment was approved by Arizona voters, the Arizona Attorney General issued a lengthy official opinion interpreting its provisions. O.A.G. I89-099, Appendix A, *infra*. This opinion provided a construction that "is compatible with the United States Constitution and federal laws." *Id.* at A-1. It concluded that the Amendment "requires that official acts of Government be expressed in English", but does not "prohibit the use of other languages where they are reasonably required in the day to day operation of Government." *Id.* at A-2. In its briefs in the courts below, the Arizona Attorney General repeatedly confirmed that O.A.G. I89-009 is "the official position of the State of Arizona on the

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[2] The lower courts failure to adopt the Attorney General's opinion is discussed *infra*, at pp. 5-9.

proper interpretation" of the Amendment.[3] He reiterated that the Amendment appl[ies] only to 'official' acts" and "official government functions or actions," but not to "[r]outine conversations, instructions and communications with agencies or citizens."[4] The Attorney General's opinion is reasonable and should have been applied by the lower courts to save the Amendment from facial invalidation.

This Court has repeatedly stated that a statute that is "readily susceptible" to a narrowing construction is not subject to facial invalidation. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *Erznoznik*, 422 U.S. at 216 (1975). In judging the constitutionality of a state law, the Court has regularly relied upon interpretations of the challenged statute by state officials and/or agencies -- some far less authoritative than those of the Arizona Attorney General here. *See, e.g., Frisby*, 487 U.S. at 483 (construing picketing ordinance narrowly to save its constitutionality and stating that "This narrow reading is supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view of the 'picketing' proscribed by the ordinance"); *see also Broadrick*, 413 U.S. at 617-18 (referring to State Personnel Boards' interpretation of the statute in question and stating, "Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute"); *Bellotti v. Baird*, 428 U.S. 132, 143 (1976) ("the interpretation placed on the statute by appellants in this Court is of some importance and merits attention because they are the officials charged with the enforcement of the statute"); *Law Students Research Council v. Wadword*, 401 U.S. 154, 162 (1971) (accepting the interpretation of state enforcement officials despite

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[3] Br. of State of Arizona, 9th Cir. No. 93-15719, p. 3, fn. 1; see Br. of State of Arizona on Rehearing en Banc, 9th Cir. No. 93-15719.

[4] Br. of Attorney General on Rehearing en Banc, adopting Br. on Rehearing of U.S. English, p. 4.



the "language of the Rule [which] lends itself to a construction that could raise substantial constitutional questions").

Prior decisions of this Court make clear that the proffered narrowing construction need not be the most natural reading of the statute. In *United States v. X-Citement Video, Inc.*, __ U.S. __, 115 S.Ct. 464, 472 (1994), the Court rejected a strict grammatical construction of statutory language, reasoning that "It is . . . incumbent upon us to read the statute to eliminate . . . [constitutional] doubts so long as such a reading is not plainly contrary to the intent of [the legislature].". In support of this canon of statutory construction, the opinion cited the analysis in *Debartolo Corp. v. Fla. Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988), which quoted *Hooper v. California*, 155 U.S. 648, 657 (1895). The latter case interpreted a California penal statute in a manner which avoided constitutional problems, stating that " 'the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *Debartolo*, 485 U.S. at 575. *See also Ehlert v. United States*, 402 U.S. 99, 105-106 (1971) (Army General Counsel's opinion as to meaning of draft statute accepted to save constitutionality of statute, where opinion was "plausible . . . but not the only possible [construction]").

In the instant action, the Arizona Attorney General issued an opinion construing the amendment to apply only to the "official acts" of government. This construction of the Amendment was reasonable under the standards set forth in *X-Citement, supra*. The lower courts did not even contend that this construction conflicted with the intent of the framers of the Amendment, or the general understanding of the electorate. The Attorney General's opinion is also consistent with the language of the Amendment. The Amendment (including its title) repeatedly refers to English as the "official language" of Arizona. *Webster's Third New International Dictionary*, p. 1566 (1976) defines "official" to mean "formal" and "authoritative." Thus, the

Attorney General properly ruled that the Amendment did not apply to informal conversations and writings of government employees.

The lower courts rejected the Attorney General's construction, because Sec. 3(1)(a) of the Amendment, which requires state political units to "act in English", does not contain the word "official". The *X-Citement* opinion, however, teaches that courts should not demand reiteration of words in various parts of a statute when judging its constitutionality. *X-Citement*, 115 S.Ct. at 467. Moreover, Sections 1 and 2 of the Amendment make clear that the Amendment only deals with official or formal English use. Thus, there was no need to repeat this limitation in Sections 3 or 4, which involve other details regarding when English is or is not required.

Judge Reinhardt's majority opinion is also inconsistent with the *X-Citement* rationale insofar as it insisted on a rigid grammatical construction of the Amendment. Section 3(1)(a) of the Amendment provides that political subdivisions must "act in English". The Attorney General properly determined that "act" in this context means a "decision or determination of a sovereign, a legislative council, a court of justice," relying on *Webster's Third International Dictionary*, *supra*, at 20. The Court of Appeals improperly rejected this interpretation on the ultra-literal basis that this definition was contained under the noun "act", whereas Sec. 3(1)(a) uses "act" as a verb. A similarly rigid grammatical construction was rejected by this Court in *X-Citement*, *supra*.

In sum, the Arizona Attorney General has provided a reasonable interpretation of the Amendment, which carves out its legitimate applications and cures any arguable constitutional defects. It is immaterial that the Opinion is not the most natural reading of the Amendment, or the reading that the lower courts deem to be such. The Opinion demonstrates that the Amendment is "readily susceptible" to a narrowing construction. Even



more leeway should be given to state officials in construing their own basic Constitutional provisions, especially those which are enacted by citizen referendum and which are particularly in need of administrative construction. In keeping with precedent established by this Court, the lower courts should have adopted the Attorney General's opinion to save the Amendment from facial invalidation and future constitutional attack. Accordingly, the Petition for Certiorari should be granted so this Court may establish a proper standard for recognizing the authority of state officials to interpret and implement their own state constitutional provisions.

### C. As An Alternative To Adopting The Attorney General's Opinion, The Lower Courts Should Have Certified The Case To The Arizona Supreme Court For An Authoritative Construction Of The Amendment.

The Arizona Supreme Court has jurisdiction to accept certification pursuant to Ariz. Const. art. 6, § 5(6); A.R.S. § 12-1861; and Rule 27(a) of the Rules of the Arizona Supreme Court. It was a fundamental misuse of federal powers for the lower courts to fail to utilize these state certification procedures under the standards established by this Court in *Bellotti v. Baird*, 428 U.S. 132 (1976).

In *Bellotti*, plaintiffs brought an action in district court challenging the constitutionality of a Massachusetts statute governing access to abortions by minors. Specifically, the plaintiffs argued that the statute unconstitutionally established a "parental veto" over the performance of abortions on minors, even those capable of giving informed consent. The state defendants argued that the statute only established a "preference" for parental consent and that it did not establish a "parental veto" power. The lower courts rejected the state's interpretation and issued a declaratory judgment against the enforcement of the statute. On appeal, the Supreme Court vacated the declaratory judgment and

held that the lower courts erred in refusing to certify the case to the Massachusetts Supreme Court. The Court stated:

> In deciding this case, we need go no further than the claim that the District Court should have abstained pending construction of the statute by the Massachusetts courts. As we have held on numerous occasions, abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem. (internal citations omitted).

*Bellotti*, 428 U.S. at 146-47. *See also Virginia v. American Booksellers Association*, 484 U.S. 383 (1988) (certification is proper where unconstrued state statute is susceptible to multiple interpretations); *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 510 (1972) ("the paradigm case for abstention arises when the challenged state statute is susceptible of a 'construction by the state courts that would avoid or modify the [federal] constitutional question' "); *Harrison v. NAACP*, 360 U.S. 167, 177 (1959) ("we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem," thus, abstention is proper).

In the present case the parties have suggested varying interpretations of the Amendment. The plaintiffs below asserted, and the lower courts held, that the Amendment applies to all state employees in all circumstances in which they are required to communicate either in writing or verbally. The Arizona Attorney General, acting on behalf of the State, has promulgated a narrower interpretation under which the Amendment would apply only to "official" acts of government. At least



one Arizona state court has upheld the Amendment's constitutionality as applied to court petitions. *Robles v. Mofford*, No. 261837 (Sup. Ct. Pima County), Nov. 14, 1989.

As discussed *supra*, at pp. 5-9, the Attorney General's opinion is reasonable and does not contradict the plain meaning of the Amendment. Thus, the Amendment is susceptible to multiple interpretations, at least one of which would save it from constitutional attack and/or materially alter the constitutional question before the Court. Further, the Arizona courts have not had an adequate opportunity to construe most provisions of the Amendment.

This is the "paradigm" case for certification. We have here a fundamental state constitutional provision, enacted by a majority of Arizona voters. It was particularly improper for the lower courts to facially invalidate the Amendment without first obtaining an authoritative construction from the Arizona Supreme Court. *See Bellotti*, *supra*. Accordingly, if this Court declines to adopt the opinion of the Arizona Attorney General, at the very least, the Court should certify the case to the Arizona Supreme Court to construe the Amendment.

## III. Conclusion

For the foregoing reasons, U.S. English, Inc., as *amicus curiae*, respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,

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## APPENDIX A

**The Honorable Robert B. Osdane**
**President of the Senate**

**Re: I89-009 (R88- January 24, 1989)**

We have been asked a number of general and specific questions concerning the constitutionality and effect of Proposition 106 on the delivery of governmental services and on some governmental activities. We conclude that Proposition 106, which adds to the Arizona Constitution article XXVIII, entitled English as the Official Language, is constitutional and will not greatly change the way government operates presently.

It is our duty to give Proposition 106 a construction that is compatible with the United States Constitution and federal laws. *See* Ariz. Const. art. II, § 3 ("The Constitution of the United States is the supreme law of the land."); *State v. Ramos, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982); Schecter v. Killingsworth,* 93 Ariz. 273. 282, 380 P.2d 136, 142 (1963). We must also interpret this amendment to the Constitution as a whole and in harmony with the other portions of the Arizona Constitution. *State ex rel. Nelson v. Jordan,* 104 Ariz. 193. 196, 450 P.2d 383, 386 (1969); *State ex rel. Jones v. Lockhart,* 76 Ariz. 390, 398, 265 P.2d 447, 453 (1953). Guided by these principles, we conclude that the language of Proposition 106 does not prohibit the use of a language other than English to facilitate the delivery of governmental services. Additionally, Proposition 106 specifies in subsection 3(2)(b) that the "State may act in a language other than English . . . to comply with other federal laws."

Consequently, we do not conclude that Proposition 106 requires a diminution or unreasonable restriction of services or the placing of barriers to access to governmental processes for non-English speakers, because such an interpretation is not required by the text of the amendment itself and could be

inconsistent with applicable federal law and the Arizona and United States Constitutions.

Turning now to the language of the Proposition itself, it suggests that the purpose of the amendment is to require that official acts of government be expressed in English as the state's official language. It does not prohibit the use of other languages when they are reasonably required in the day-to-day operation of government.

Proposition 106 contains four sections. Section 1 states that "The English language is the *official* language of the State of Arizona," and goes on to provide that "As the *official* language of this State, the English language is the language of the ballot, the public schools and all government functions and actions." (Emphasis added.) The remainder of section 1 makes clear that this status of English as the official language applies to all branches and levels of government, to all official documents, and to all officials and employees.

Section 2 provides that "This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona." Neither section 1 nor section 2 contain any language prohibiting the use of any language other than English.

Section 3 does, however, contain terms which prohibit governmental *acts* in a language other than English. After providing for certain exceptions, subsection 3(a) states: "This State and all political subdivisions of this State shall *act* in English *and in no other language.* (Emphasis added.) Subsection 3(b) prohibits governmental entities from requiring the use of a language other than English, and 3(c) states that governmental documents must be in English to be valid and enforceable. The exceptions to the requirement that governmental entities *act* in English are (in accurate paraphrase): (a) to assist in English-as-a-second-language instruction; (b) to comply with



federal laws; (c) to teach a foreign language; (d) to protect public health or safety; and (e) to protect the rights of criminal defendants or victims of crime.

Section 4 provides for a private cause of action to enforce the article.

Most of the concerns raised in the opinion request involve the use of a language other than English in the delivery of governmental services. Therefore subsection 3(1)(a), which contains the words "shall *act* in English and in no other language," is the applicable subsection that will be primarily discussed. (Emphasis added).

If use of a language other than English is reasonably needed to provide governmental services fairly and effectively without adversely impacting an ethnic/linguistic group, the use of that language by the deliverer of governmental services is required by federal laws. The federal laws most closely relevant are Titles VI and VII of the Civil Rights Act of 1964, as interpreted by their implementing regulations and by the courts.[1]

Section 601 of Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a, defines "program or activity" very broadly as:

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[1] Title VI; 42 U.S.C. § 2000d-7; Title VII: 42 U.S.C. § 2000e to 2000e-17; for a survey of the Title VI implementting regulations, see *Guardians Association v. Civil Service Commission of the City of New York,* 463 U.S. 582, 618-621 (1983). For the discussion of Title VII interpretations, see *infra* pp. 7, 9.

> a department, agency or other instrumentality of a State or of a local government; or the entity of such State or local government that distributes such assistance and each such department or agency . . . to which the assistance is extended . . . ; or . . . a public system of higher education agency . . . or other school system . . . .

If an entity receives no federal assistance, its duty to provide services (if fairness and effectiveness so require) in a language other than English is, as discussed *infra* at pp. 6-8, nonetheless not precluded by Proposition 106. We reach this conclusion because of our interpretation that the English-only requirement applies only to official acts of government, and not to every act of every government official or employee. Further, a contrary conclusion would raise serious questions under the equal protection clause of the United States and Arizona Constitutions.

If a governmental entity is covered by Title VI and appropriate regulations, proof of intentional discrimination (including discrimination based on ethnicity) is not necessary to prove a violation of this federal law. *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983). All that is needed is a showing that the entity applies a rule, even if fair on its face, which has an adverse impact on an ethnic minority, and is not justified by a business necessity.[2]

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[2] This result follows from the language and construction of Title VI and its implementing regulations. At least forty federal agencies have adopted regulations implementing Title VI and applying the disparate impact standard. *See Guardians*, 463 U.S. at 619, and nn.6-7. Funding provided by these agencies affects a very broad range of governmental services. *See also Alexander v. Choate*, 469 U.S. 287 (1985) (state policy having disparate impact on handicapped persons would be prohibited by regulations implementing section 504 of the Rehabilitation Act of 1973 if "meaningful access" to benefits not provided; Title VI regulations referred to as providing guidance for standard).



Linguistic groups are ethnic groups, and non-English speakers in Arizona and the United States meet the criteria of ethnic minorities.[3] If the words in subsection 3(1)(a), "act in English and in no other language" were to be construed to mean that needed governmental services could not be delivered in a language other than English no matter what the needs of fairness and effectiveness, there would be an adverse impact on non-English speakers. Such a construction would result in a violation of federal law. Moreover, the practice of delivery of services in a language other than English (where reasonably needed) would be an exception provided for by subsection 3(2)(b).[4].

Thus, if the words of section 3(1)(a), "This State . . . shall act in English and in no other language" were to be construed

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[3] *See, e.g. Yu Cong Eng. v. Trinidad*, 271 U.S. 500 (1926) (Philippine law prohibiting keeping of account books in any language other than English, Spanish or a local dialect violates equal protection and due process rights of Chinese, in spite of defense that law was needed to facilitate tax collection); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (prohibition of teaching children in any language other than English which was directed at persons of German descent violates due process cluase); *Bartels v. Iowa*, 262 U.S. 404 (1923) ("Official English" statute directed at persons of German descent violates due process).

[4] *See generally*, Note, "'Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States." 100 Harv. L. Rev. 1345 (1987). *See also Lau v. Nichols*, 414 U.S. 563 (1974). In *Lau*, the Court noted that "there is not equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." 414 U.S. at 566. For the application of the disparate impact standard (as opposed to requiring proof of intentional discrimination) to "English-only" rules in an employment context, see, *Gutierrez v. Municipal Court of Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988); 29 C.F.R. § 1606.7(b)-(c) (1987); E.E.O.C. Decision 83-7, 31 F.E.P. 1861 (1983). *See also Civil Rights Division of the Arizona Department of Law v. Amphitheater Unified School District*, 140 Ariz. 83, 680 P.2d 517 (App. 1983) (recognizing disparate impact analysis appropriate to establish a violation of the Arizona Civil Rights Act, and establishing "business necessity" as the proper standard of defense).

to mean "shall deliver services in English and in no other language," the subsection 3(2)(b) exception (compliance with federal laws), would almost entirely swallow up the rule. Examining the language of Proposition 106, in context, we do not believe this was what was intended. Although Proposition 106 does not define "act," section 1 gives some guidance, providing, in pertinent part, as follows:

(2) As the official language of this State, the English *language is the language of the ballot, the public schools and all government functions and actions.*

(3)(a) This Article applies to:

(i) the legislative, executive and judicial branches of government.

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities.

(iii) *all statutes, ordinances, rules, orders, programs and policies.*

(iv) all government officials and employees during the performance of government business.

(Emphasis added). Because of the broad introductory language of subsection 1(2), clearly stating that English shall be used for ballots, public schools, and "all government functions and actions," we do not perceive subsection 1(3)(a) (iii) to be an exclusive list, but rather examples of the types of official acts that are contemplated to be covered by Proposition 106.[5] We also look to the dictionary for a common meaning of the word "act." The most clearly applicable common meaning of "act"

[5] Enumeration of a list of items in a constituion generally expresses the intent to exclude items not included in the list. *Whitney v. Bolin,* 85 Ariz. 44, 47, 330 P.2d 1003, 1005 (1958). However, this principle will not be applied to contradict the apparent intent of a provision, *Forsythe v. Paschall,* 34 Ariz. 380, 383, 271 P. 865, 866 (1928).



used as a noun is "a decision or determination of a sovereign, a legislative council, or a court of justice." Webster's International Dictionary 20 (3ed., unabridged, 1976).

We therefore construe "act" in this context to mean an official act of the government.

Such a construction may also be necessary to avoid conflict with the equal protection clauses of the fourteenth amendment to the federal constitution and article II, section 13 of the Arizona Constitution.[6] Classifications based on ethnicity will be closely scrutinized, and will violate the equal protection clause unless the government can justify them by establishing a compelling interest, *Hernandez v. Texas,* 347 U.S. 475 (1954); *Graham v. Richardson,* 403 U.S. 365 (1971) (alienage). Classifications based on language are not in themselves considered, for equal protection purposes, to be invidiously discriminatory classifications based on ethnicity. *Soveral-Perez v. Heckler,* 717 F.2d 36 (2d Cir. 1983); *Frontera v. Sindell,* 522 F.2d 1215 (6th Cir. 1975); *Carmona v. Sheffield,* 475 F.2d 738 (9th Cir. 1973). Where an intent to discriminate on the basis of ethnicity can be shown as a purpose of the language classification, however, an intent to discriminate invidiously may be inferred. *Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 1031, 1039 and n.6 (9th Cir. 1988) (approving the reasoning of Olagues v. Russoniello,* 797 F.2d 1511, 1520-21 (9th Cir. 1986) (en banc), *vacated as moot,* ____ U.S.____, 108 S.Ct. 52, 98 L. Ed. 2d 17 (1987) (language a proxy for intentional discrimination on basis of ethnicity where ethnic group thus identified

[6] Article II, section 13 provides:

No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to al citizens or corporations.

"The equal protection clauses of the 14th Amendment and the state constitution have for all practical purposes the same effect." *Valley National Bank of Phoenix v. Glover,* 62 Arix. 538, 554, 159 P.2d 292, 299 (1945).

carries a history of mistreatment, political exclusion, and historically long-term use of language identified with ethnicity)). Discrimination based on linguistic characteristics has also been directly held to constitute intentional ethnic discrimination in an employment law (Title VII) context. *Carino v. University of Oklahoma Board of Regents,* 750 F.2d 815 (10th Cir. 1984); Berke v. Ohio Department of Public Welfare, 30 F.E.P. 387 (S.D. Ohio 1978), *aff'd*, 628 F.2d 980 (6th Cir. 1980) (per curiam).

Intentional discrimination has been inferred where actions by the majority were seen to give governmental effect to private biases. *See, e.g., Palmore v. Sidoti,* 466 U.S. 429 (1984). Intent has been inferred as least three times by the United States Supreme Court where voters approved popular referendum measures which, although facially fair, had the effect of overturning legislative enactments which legitimately served the needs of minorities. In *Reitman v. Mulkey,* the California legislature had prohibited racial discrimination in housing. By the passage of Proposition 63, the voters amended the state constitution to overturn and prevent the reenactment of those laws. The Court voided the Proposition as violative of the equal protection clause because it gave effect to private biases in attempting to take away protection already given to minorities. 387 U.S. 369 (1967). The Court followed the same principle in voiding "voter approval" and "voter initiative" measures which purported to reverse anti-discrimination laws enacted by a legislative body. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School District No. 1,* 458 U.S. 385 (1969); *Washington v. Seattle School District No. 1,* 458 U.S. (1982).[7]

We do not interpret Proposition 106 as necessitating elimination of assistance provided by government in languages other than English where such assistance is reasonably needed to

[7] *See also Plyler v. Doe*, 457 U.S. 202, 219 (1982) (creation of ethnic "underclass" by excluding minor children of undocumented resident aliens present within the United States from public school system violates equal protection clause).



ensure fair and effective delivery of governmental services to non-English speakers. If this were required, the Proposition could be found to give governmental effect to private biases by taking away protection legitimately offered to those entitled to them, and thus would be voided as a violation, not only of Title VI, but also of the federal and state equal protection clauses.[8]

To avoid possible conflicts with the federal and state constitutions and federal laws, we therefore conclude that Proposition 106 cannot interfere with the fair and effective delivery of governmental services in languages other than English, or otherwise affect governmental operations so as to unreasonably disadvantage non-English speakers.

Consistent with this conclusion, we reiterate that the provision of Section 3(1)(a). "This state and all political subdivisions of this state shall act in English and in no other language," means that official acts of government as government shall be in English as the State's official language. It does not mean that languages other than English cannot be used when reasonable to facilitate the day-to-day operation of government. With these general conclusions in mind, we are now able to answer the specific questions presented to us.

We have been asked if any restrictions on the use of a language other than English need to be made in any of the following situations:

a. The interaction of state lottery officials with non-English speaking persons . . . either as employees or agents, or as lottery contestants?

A requirement that an employee speak only English on the job, or a requirement that all employees be able to speak English would be a violation of Title VII of the Civil Rights Act of 1964 unless those requirements are bona fide occupational qualifications reasonably necessary to the operation of governmental

[8] *See also* cases cited in n.3, *supra*.

business. *Guitierrez v. Municipal Court of Southeast Judicial District,* 838 F.2d 1031 (9th Cir. 1988). A state "Official English" law cannot be used to establish a bona fide occupational qualification. *Id.* at 1044. The ability to speak English could be a bona fide occupational qualification for an employee if regular contact with the English-speaking public is part of the job requirements, or if an employee would be required, for instance, to interpret official English documents or transmit directions delivered in English. If it is not "reasonably necessary" for all employees of the state lottery to be English proficient in order to perform certain jobs for the lottery, it would be permissible for supervisors to communicate with employees who do not speak English in, or through, another language. Lottery contestants who do not speak English may be communicated with in a language other than English in the day-to-day delivery of services, on the general principles discussed above.

b. The printing of motor vehicle division pamphlets or oral explanation of licensing procedures to applicants for driver and vehicle licensing in languages other than English?

The provision of non-English assistance, whether written or oral, is permissible, and is required if it is necessary to reasonably provide fair and effective services. The nature and extent of the requirement depends on what is both reasonable and necessary for the purpose. *See, e.g, Lau v. Nichols,* 414 U.S. 563 (1974). What is required also depends on whether or not there are any applicable federal regulations. Moreover, the exemption set out in subsection 3(2)(d) permits use of a language other than English "to protect public health or safety."

c. The naming or designation of highways, streets, bridges, or towns in languages other than English?

The name itself is not an act of government, as we have interpreted the word "act." We perceive a distinction between the use of a word for purposes of identification and the use of



language for the purpose of communication of ideas. Further, we recognize that words from other languages historically have been and continue to be absorbed into and become a part of the English language. What Proposition 106 requires is that the governmental acts which create and perpetuate the name be articulated in English. It does not prohibit the use of a non-English name as a street name.

d. The handling of customer inquiries or complaints involving state or local government services, such as ADOT relocation services, child support enforcement, or city water billings, in languages other than English. Is general communication between elected officials and all other governmental employees with the public at large permissible in other than . . . English?

All official documents that are governmental acts must be in English, but translation services and accommodating communications are permissible, and may be required if reasonably necessary to the fair and effective delivery of services, or required by specific federal regulation. Communications between elected and other governmental employees with the public at large may be in a language other than English on the same principles.

In addition, an elected official may have a federal first amendment right to communicate with constituents in the language of choice. *See Garrison v. State of Louisiana,* 379 U.S. 64 (1964) (elected official has first amendment protection for statements made in the conduct of his office); *Reeves v. McConn,* 631 F.2d 377 (5th Cir. 1980) (first amendment right of expression includes rights to communicate by most effective means).

e. Discussing professional or business licensing requirements, or accepting license applications, in languages other than English?

Discussions may be in a language other than English, and interpretation services may be provided, but the official application acted upon and the official license issued must be in English.

f. Providing information on state parks services or programs in languages other than English?

On the same principles, such translations, and direct provision of services in languages other than English are permissible. Since the state parks provide services to visitors from around the world, this question represents a good example of why "shall act" in the Proposition must mean "shall act officially as the government" and not "shall provide services." Moreover, the exemption of subsection 3(2)(d) would permit use of a language other than English if deemed necessary for health and safety reasons in the discretion of those responsible for the parks.

g. Providing information on services or programs offered at common schools or universities in languages other than English?

Again, providing such services and information is permissible and may be required. In particular, educational institutions subject to Title VI should refer to the federal regulations applicable to their agency.

h. The practice of the Governor, employees of the Commerce Department, and other state or local officials or employees visiting with non-English speaking foreign government officials or business representatives of foreign corporations to conduct trade missions and related promotional activities on behalf of Arizona?

Such discussions are permissible, as are translations of any official documents which may result, but the official documents as they are to be acted upon by governments in Arizona must be in English.



i. [W]ith respect to each of the above questions . . . would the answers given change if the non-English speaking persons involved are native Americans?

Our answers would be not be different because the persons involved are native Americans.

In summary, we conclude that Proposition 106 requires official acts of government to be in English. It does not prohibit the use of languages other than English that are reasonably necessary to facilitate the day-to-day operation of government. Proposition 106, therefore, is constitutional, under both the Arizona and United States Constitutions, and compatible with applicable federal law.

MOTION FILED

JAN 22 1996

No. 95-974

# In The
# Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelley F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Petition for a Writ Of Certiorari to the United States Court of Appeals for The Ninth Circuit

## MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND PROPOSED BRIEF OF THE EQUAL OPPORTUNITY FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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January 22, 1996

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Movant Equal Opportunity Foundation, Inc. ("EOF"), is a non-profit educational corporation, dedicated in part to fostering a pro-assimilation middle ground on the issue of immigration - rejecting the views of both nativists claiming that today's immigrants cannot assimilate and multiculturalists who argue that they should not. EOF participated in this case as an unsuccessful amicus curiae (with the Washington Legal Foundation) during the Ninth Circuit's *en banc* review. Consent to file this brief was received from three of the four counsels of record, but no response was received from counsel for respondent Arizonans Against Constitutional Tampering.

EOF's interest in this case arises from the decision below's likely effect on one of EOF's primary activities: reform of bilingual education. Although bilingual education reform issues were briefed at the Ninth Circuit level and will be affected by any decision in this case, they are not treated in depth in the Petition for Certiorari. Since the form of bilingual education is one of most common and expensive language-choice decisions faced by governments at many levels, this Court should consider the important constitutional issues raised by this case in the context of bilingual education reform.

Respectfully submitted.

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January 22, 1996

## INTEREST OF AMICUS

The Equal Opportunity Foundation ("EOF") is a non-profit educational organization, founded in 1987, dedicated in part to fostering a pro-assimilation middle ground on the issue of immigration - rejecting the views of both nativists claiming that today's immigrants cannot assimilate and multiculturalists who argue that they should not. EOF's President, Linda Chavez, is a former director of the U.S. Commission on Civil Rights and has written about this case. Linda Chavez, "Multilingualism Getting Out of Hand," USA Today, Dec. 14, 1994.

EOF is concerned that the decision of the United States Court of Appeals for the Ninth Circuit in this case will have substantial effects on the ability of language minority children to learn English. EOF, which is at the forefront of the debate over methods of teaching language minority children, does not wish the First Amendment to enshrine some teaching methods which may be harmful to children.

## STATEMENT OF CONTEXT

"Bilingual education began as a good idea. Now it needs fixing." Susan Headden, "Tongue-tied in the Schools," U.S. News & World Report, September 25, 1995, 44. "[B]ilingual education has emerged as one of the dark spots on the grim tableau of American public education. . . . [T]he program was born of good intentions, but today it has mushroomed into a $10 billion-a-year bureaucracy that not only cannot promise that students will learn English but may actually do some children more harm than good." *Id.*; "New York's Bilingual 'Prison,'" The New York Times, A22, col. 1, September 21, 1995 ("Whatever the merits of bilingual education, the present approach may be harming more students than it helps.").

The New York Board of Education recently concluded that new immigrants instructed in English alone performed better than students in bilingual education programs where comparatively little English is spoken. Board of Education of the City of New York, *Educational Progress of Students in Bilingual and ESL Programs: A Longitudinal Study, 1990-1994*, October 1994, ii; American Legislative Exchange Council, "Bilingual Education in the United States, 1991-92" in *Report Card on American Education*, 1994, 3 ("there is no conclusive research that demonstrates the educational superiority of bilingual education over ESL [English as a Second Language programs].").

The harm to children, both language minority and others, is easily documented. "According to the [New York City] Board of Education study, 90 percent of the students who enter bilingual education between sixth and ninth grade fail to move on to regular classes within the required three years. Among students who enter between first and third grade, the failure rate is 75 percent." "New York's Bilingual 'Prison'", *supra*. In some children who speak only English are placed in bilingual classes because of their surnames. Headden, *supra*, at 44; Linda Chavez, Out of the Barrio, 1991, at 30. Parents' requests to have their children taught in English are disregarded. "'Why?' the teacher asked. 'Don't you feel proud to be Hispanic?'" Headden, *supra*.

This is an active political controversy, and therefore should never have been considered by the federal courts. In November, the California Board of Education adopted a new educational policy in which they abandoned California's traditional preference for bilingual education programs. CONG. REC. (daily ed.) December 5, 1995, H 13932. Congressional hearings on bilingual education are beginning. *Id.* Sen. Robert Dole has made reform of bilingual education a plank of his presidential campaign. Bob



Dole, "Ticket to the American Dream," The Washington Post, December 19, 1995, A 15, col. 1.

In Arizona, this controversy may erupt again, as a result of the Ninth Circuit's decision. The Arizona Constitition requires that "schools shall always be conducted in English". Art. XX, § 7, ARIZ. CONST. Similarly, the Arizona bilingual education statute provides that the goal of bilingual education in that State is to teach children English so they can transfer to classes taught in English. A.R.S. § 15-754. These requirements may be challenged.

## REASONS TO ISSUE THE WRIT

### I) The Ninth Circuit's Decision to Use the First Amendment to Determine Bilingual Educational Policy Conflicts With Decisions of Other Courts:

Until the decision in this case, language choices in education had been a political question. In *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923), this Court said "The power of the State to . . . make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." The decision in this case changed that understanding. The Ninth Circuit "disapproved" the decision in *Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978), which said that the choice of language in schools was a political, not a constitutional, matter.

As shown above, mounting evidence demonstrates that prior bilingual teaching methods may harm some children. The decisions on how best to educate language minority children should be flexible, based on the best available information.

Now, however, under the Ninth Circuit decision in this case, the First Amendment will be the test for teaching methods. If, for example, a teacher refuses to teach chil-

dren English, the State may not discipline the teacher; after all, there is no legal difference between what Respondent Maria-Kelley Yniguez seeks to do in this case (prepare Spanish-language legal materials) and what a teacher might do (teach only in a language other than English). Just as with Yniguez, the teacher is "speaking" on behalf of the state, and would have the same rights granted to Yniguez not to be "compelled" to say something the teacher did not agree with.

Last year this Court unanimously said: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-American Gay Group of Boston*, __ U.S. __, 115 S.Ct. 2338, 2350 (1995). Yet that is what the Ninth Circuit would do in this case, solely to promote "the diverse and multicultural character of our society." 69 F.3d at 948.

Under the Ninth Circuit's analysis, what the State cannot do to others under *Hurley*, its own employees may do to it. That position conflicts with this Court's decisions.

For example, in *Minnesota State Board for Community Colleges v. Knight* ("*Minnesota*"), 465 U.S. 271, 283 (1984), this Court said: "Appellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public [or] as **government employees**". Similarly, "Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to iisten or respond to individuals' communications on public issues. Indeed, in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-466 (1979), the Court rejected the suggestion. . . . Disagreement with public policy and disapproval of offi-



cials' responsiveness . . . is to be registered principally at the polls." *Id.*, 465 U.S. at 285.

In *Hurley*, this Court granted certiorari "to determine whether the requirement to admit a . . . message not of the . . . organizers' own choosing violates the First Amendment." __ U.S. at __, 115 S.Ct. at 2343. This Court should review this case as well.

## CONCLUSION

This Court should grant the Petition and issue the writ.

Respectfully submitted.

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No. 95-974

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ARIZONANS FOR OFFICIAL ENGLISH
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CONSTITUTIONAL TAMPERING,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

# BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND UNITED STATES REPRESENTATIVES CHARLES T. CANADY, TOBY ROTH, HENRY J. HYDE, BOB LIVINGSTON, BILL BAKER, DOUG BEREUTER, THOMAS J. BLILEY, JR., PETER BLUTE, SONNY BONO, ED BRYANT, PHILIP M. CRANE, JOHN T. DOOLITTLE, ROBERT K. DORNAN, BOB GOODLATTE, MEL HANCOCK, MARTIN HOKE, DANA ROHRABACHER, ED ROYCE, MATT SALMON, JIM SENSENBRENNER, JR., AND CHARLES H. TAYLOR AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1995**

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No. 95-974

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ARIZONANS FOR OFFICIAL ENGLISH
and ROBERT D. PARK,
*Petitioners,*

v.

STATE OF ARIZONA;
MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ;
and ARIZONANS AGAINST
CONSTITUTIONAL TAMPERING,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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# BRIEF OF THE WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit law and policy center with more than 100,000

supporters nationwide. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in opposing intrusions by the federal government into decisions about the operations of state governments, where those decisions are properly reserved to the states' citizens. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court, as well as other courts across the country. For example, in *Wilson v. Voting Rights Coalition* (Sup. Ct. No. 95-673), WLF filed a brief supporting California in its litigation over the constitutionality of the unfunded mandates in the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-1 *et seq*. WLF also filed a brief before the lower court, sitting *en banc*, in the present litigation.

United States Representatives Charles T. Canady, Toby Roth, Henry J. Hyde, Bob Livingston, Bill Baker, Doug Bereuter, Thomas J. Bliley, Jr., Peter Blute, Sonny Bono, Ed Bryant, Philip Crane, John T. Doolittle, Robert K. Dornan, Bob Goodlatte, Mel Hancock, Martin Hoke, Dana Rohrabacher, Ed Royce, Matt Salmon, Jim Sensenbrenner, Jr., and Charles H. Taylor are Members of Congress who oppose the ruling of the court below and who believe it warrants review by this Court. These Members are concerned by the decisions's potential implications with respect to any future legislation on "official English" by the states and by Congress. They are also concerned by the implications for government operations generally of the holding that public employees have a presumptive right under the First Amendment to determine how and whether to comply with official directives concerning "expressive" job functions.



Rep. Charles T. Canady is chairman of the Subcommittee on the Constitution of the House Judiciary Committee.

Rep. Toby Roth is the sponsor of H.R. 739, the Declaration of Official English Act, a bill to declare English as the official language of the United States Government. Many of the Members joining this brief are among the 94 current co-sponsors of H.R. 739.

Rep. Henry J. Hyde is chairman of the House Judiciary Committee.

Rep. Bob Livingston is chairman of the House Appropriations Committee.

*Amici* believe that government policy, particularly in a diverse society such as ours, should promote the use of a common language. *Amici* further believe that it is constitutionally permissible for voters to determine that their government must act in that common language in most circumstances as a means of increasing government efficiency and furthering civic and social unity.

All parties have consented to the participation of the *amici*. Consent letters from counsel have been lodged with the Clerk of the Court.

## SUMMARY OF ARGUMENT

This case presents this Court with an important opportunity to decide an issue of great and enduring national importance: whether the government may direct its employees to perform the government's official business exclusively in a particular language. By the narrowest of margins — a six-to-five vote of an *en banc* panel — the U.S. Court of Appeals for the Ninth Circuit took the extraordinary step of striking down the "Official English" provision of the Arizona state constitution. The decision below was based on the purported First Amendment rights of public employees essentially to commit insubordination while on the job; the analyses of the several majority and dissenting opinions turn largely on the application of decisions of this Court. Thus, only this Court can provide definitive guidance.

The constitutional issues presented in this case have import far beyond the borders of Arizona: Official English provisions have been adopted by constitutional amendment or statute in many states, and bills to enact such legislation on the federal level are before Congress. A decision by the Court in this case will not only eliminate uncertainty as to the validity of Official English provisions, but also provide important direction to lower courts as to a variety of legal issues involving government policy on language. In light of the extensive analysis of the legal issues by the courts below and legal commentators, the Court should take this opportunity to address the extent to which the U.S. Constitution constrains government action to preserve English as the nation's common and official language.



## ARGUMENT

### I. The Issues Presented by the Petition Are Matters of Great National Importance Deserving Review by this Court.

This Court should grant a writ of certiorari and review the decision below of the Ninth Circuit because the case squarely presents an issue of great national significance: may the people direct their government to conduct its official business only in the people's common language. Regardless of one's position on the merits of that question, it is an issue that has been closely scrutinized, hotly debated, and frequently raised, and one that deserves this Court's review at this time and in this case.

The decision below cries out for review. By a six-to-five vote of an *en banc* panel, the Ninth Circuit held Article XXVIII of the Arizona Constitution to be invalid under the U.S. Constitution. That constitutional provision had been adopted by a vote of the people of Arizona in 1988. Invalidation of a state law — particularly a state constitutional provision, and even more so one adopted by popular vote — is an extremely serious step that should be taken only in unusual cases after the most stringent review. Indeed, such a decision of an inferior federal court would have fallen within this Court's mandatory appellate jurisdiction under 28 U.S.C. § 1254(2) (1982) prior to the 1988 amendment of that statute. The gravity of the Ninth Circuit's invalidation of a state constitutional provision by a closely divided vote now justifies this Court's review by way of its discretionary jurisdiction.

The Arizona "Official English" constitutional provision at issue in this case is not a unique political phenomenon,

and definitive resolution of the central issues may eliminate uncertainty as to constitutional constraints and obviate further costly litigation. Several states have adopted similar constitutional provisions;[1] many more have enacted legislation to the same effect;[2] and Official English bills and ballot propositions have been advanced in many others. In addition, Congress has considered Official English constitutional amendments on at least three occasions in recent years.[3] Indeed, at this time, Congress is considering several bills that would declare English the official language of the United States and require functions of the federal government to be performed exclusively in English in most or all circumstances.[4] Many of these legislative

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[1] *See* Ala. Const. amend. 509; Cal. Const. art. III, § 6; Colo. Const. art. II, § 30a; Fla. Const. art. II, § 9; Neb. Const. art. I, § 27; *see also* Haw. Const. art. XV, § 4 (making English and Hawaiian official languages).

[2] *See* Ark. Stat. Ann. § 1-4-117 (1995); 1986 Ga. Laws 529; 5 Ill. Compiled Stat. Ann. 460/20 (Michie 1995); Haw. Rev. Stat. § 1-13 (1995); Ind. Code Ann. § 1-2-10-1 (Burns 1995); Ky. Rev. Stat. Ann. § 2.013 (Michie 1995); Miss. Code Ann. § 3-3-31 (1995); Mont. Code Ann. § 1-1-510 (1995); 1995 N.H. Laws 157; N.C. Gen. Stat. § 145-12 (1995); N.D. Cent. Code § 54-02-13 (1995); S.C. Code Ann. § 1-1-696 (Law. Co-op. Supp. 1993); S.D. Codified Laws Ann. §§ 1-27-20 to 1-27-26 (1995); Tenn. Code Ann. § 4-1-404 (1995); Va. Code Ann. § 22.1-212.1 (Michie 1995).

[3] *See* S.J. Res. 72, 97th Cong., 1st Sess. (1981); *The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984); S.J. Res. 13, 100th Cong., 1st Sess. (1987).

[4] *See Making English the Official Language of the United States: Hearing Before the Senate Governmental Affairs Comm.*, 104th (continued...)



actions have been prompted by national and state organizations committed to affirming the role of English as the common language of the United States, including U.S. English, English Language Advocates, and petitioner Arizonans for Official English.

Nor is the Official English issue one of fleeting political significance. The end of the Cold War has seen the reemergence of cultural and linguistic units as powerful political forces around the world. The interaction between language and government, particularly the designation of certain languages as the official languages of government, has become a fundamental regime question threatening the political integrity and stability of several nations, including the former Soviet Union and Canada.[5] The ongoing struggle to preserve the Canadian federation in light of linguistic differences will continue to fuel concerns about the possibility of similar strains in American society, which

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[4] (...continued)
Cong., 1st Sess. (1995); S. 356, 104th Cong., 1st Sess. (introduced Feb. 6, 1995); S. 175, 104th Cong., 1st Sess. (introduced Jan. 10, 1995); H.J. Res. 109, 104th Cong., 1st Sess. (introduced Sept. 29, 1995); H.R. 1005, 104th Cong, 1st Sess. (introduced Feb. 22, 1995); H.R. 739, 104th Cong., 1st Sess. (introduced Jan. 31, 1995); H.R. 123, 104th Cong., 1st Sess. (introduced Jan. 10, 1995).

[5] *See, e.g.*, Frank M. Lowrey, IV, Comment, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 Emory L.J. 223 (1992); Terrence Meyerhoff, Note and Comment, *Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity*, 9 Am. U.J. Int'l L. & Pol'y 913 (1994); Kevin Sneesby, Comment, *National Separation: Canada in Context — A Legal Perspective*, 53 La. L. Rev. 1357, 1358-59 (1993).

will in turn drive legal efforts regarding the official status of the English language.[6]

This case poses most directly the question whether the government may require its employees to conduct official state business in a particular language. That issue, however, is closely related to several other issues of national importance and great concern, and a ruling by the Court in this case no doubt will provide guidance in related areas. Such related issues include whether there is a right to receive government services in languages other than English;[7] whether private employers may require their employees to speak English during business hours;[8] whether the government may require private businesses to

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[6] For example, in arguing for federal Official English legislation in recent congressional hearings, *amicus* U.S. Representative Toby Roth queried, "Could America fragment like Canada almost did?" He warned that the recent Quebec vote on secession was a "red warning light" for Americans. Jim Abrams, *Official English Needed to Keep Nation Together, Supporters Say*, Ariz. J., Dec. 27, 1995, at 4. Similarly, U.S. Senator Richard Shelby noted that "Canada offers a great case in point" for the proposition "that accommodating diverse languages only promotes instability, resentment and a threat to national sovereignty." *Id.*

[7] *See Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973); *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975).

[8] *See Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).



communicate certain messages (such as consumer product safety warnings) in languages other than English;[9] and whether linguistic skills may properly be considered in jury selection.[10] While different legal standards apply in many of these other contexts, as a practical matter there will no doubt be a substantial spill-over effect from a decision by this Court in this case.

This Court's guidance on such issues is indispensable. The Ninth Circuit's 6-5 *en banc* decision turns in great measure on the interpretation and application of decisions by this Court, including not only its seminal decision on language rights in *Meyer v. Nebraska*, 262 U.S. 390 (1923), but also several recent decisions bearing on the First Amendment rights of public employees.[11] Only this Court can give definitive instruction on the meaning and import of its prior decisions.

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[9] *See Stanley Indus. v. W.M. Barr & Co.*, 784 F. Supp. 1570 (S.D. Fla. 1992); *Ramirez v. Plough, Inc.*, 12 Cal. Rptr. 2d 423 (Ct. App. 1992), *rev'd*, 863 P.2d 167 (Cal. 1993); 40 C.F.R. § 156.206(e) (1995) (EPA regulation requiring Spanish-language warning statements in certain circumstances); 16 C.F.R. § 307.5 (1995) (FTC regulation requiring tobacco warnings to be in predominant language of non-English periodicals).

[10] *See Hernandez v. New York*, 500 U.S. 352 (1991); *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir.), *cert. denied*, 115 S. Ct. 439 (1994); *United States v. Ramos Colon*, 415 F. Supp. 459 (D.P.R. 1976).

[11] *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995); *Waters v. Churchill*, 114 S. Ct. 1878 (1994); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Connick v. Myers*, 461 U.S. 138 (1983).

## II. The Issues Presented by the Petition Are Ready for Review by this Court.

This case and the issues it presents are ripe for review by this Court. While only the Ninth Circuit among the Courts of Appeals has rendered a decision on the constitutionality of an Official English provision, it would be both unnecessary and unproductive for this Court to pass on this opportunity in order to allow the issues to percolate among the circuits. This is not a situation in which only one three-judge panel has considered the merits of the legal controversy. In this action alone, thirteen Ninth Circuit judges — the equivalent of more than four circuit panels — have written or joined panel or *en banc* opinions. The Ninth Circuit, sitting *en banc*, voted 6-5 to strike down Arizona's constitutional provision, and produced one majority opinion, two concurring opinions, and three dissenting opinions. Nor is this the only case in which the Ninth Circuit has considered English-language-only rules for public employees.[12] Where the issue was of such pressing concern, this Court has accepted review without requiring consideration by multiple circuits or even one circuit.[13]

That the issues have been sufficiently raised and explored is confirmed not only by the lower courts' several

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[12] *See Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir.), *reh'g denied*, 861 F.2d 1187, 1188 (9th Cir. 1988) (Kozinski, J., dissenting from denial of rehearing en banc), *vacated*, 490 U.S. 1016 (1989).

[13] *See, e.g., Mistretta v. United States*, 488 U.S. 361, 362 (1989) (granting certiorari before judgment in the Eighth Circuit in order to consider constitutional issues).



opinions, but also by the extensive legal commentary and scholarship on Official English proposals that have been published over many years.[14] In addition, numerous analyses have been published about related issues, including the relationship between government and language rights,[15]

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[14] *See, e.g., Language Loyalties: A Source Book on the Official English Controversy* (James Crawford ed. 1992); Dennis E. Baron, *The English-Only Question: An Official Language for Americans* (1990); *Perspectives on Official English* (Karen L. Adams & Daniel T. Brink eds. 1990); Daniel J. Garfield, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 Nw. U.L. Rev. 690 (1995); Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U.L. Rev. 481 (1994); Andre Sole, *Official English: A Socratic Dialogue/Law and Economics Analysis*, 45 Fla. L. Rev. 803 (1993); Carol Schmid, Comment, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 N.C. Cent. L.J. 65 (1992); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269 (1992); Rachel F. Moran, *Irritation and Intrigue: The Intricacies of Language Rights and Language Policy*, 85 Nw. U.L. Rev. 790 (1991); Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv. C.R.-C.L. L. Rev. 293 (1989); Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345 (1987); Valerie A. Lexion, Note, *Language Minority Voting Rights and the English Language Amendment*, 14 Hastings Const. L.Q. 657 (1987); Joseph Leibowicz, Comment, *The Proposed English Language Amendment: Shield or Sword?*, 3 Yale L. & Pol'y Rev. 519 (1985).

[15] *See, e.g.*, Jose Roberto Juarez, Jr., *The American Tradition of Language Rights: The Forgotten Right to Government in a "Known Tongue"*, 13 Law & Ineq. J. 443 (1995); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven*

(continued...)

English-only policies in private employment settings,[16] language requirements for consumer product warnings,[17]

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[15] (...continued)
*Multiracial Society*, 81 Calif. L. Rev. 863 (1993).

[16] *See, e.g.*, David T. Wiley, Note, *Whose Proof?: Deference to EEOC Guidelines on Disparate Impact Discrimination Analysis of "English-Only" Rules*, 29 Ga. L. Rev. 539 (1995); Dan Cooperider & Stephen Wiss, *Employment Law: The Limits of Deference: The Ninth Circuit Rejects EEOC Guidelines on English-Only Rules in the Workplace — Garcia v. Spun Steak*, 25 Golden Gate U.L. Rev. 119 (1995); Tanya J. Stanish, Comment, *English-Only Rules in the Workplace: Discrimination or Employer Prerogative? A Comment on Spun Steak v. Garcia*, 7 DePaul Bus. L.J. 435 (1995); Jeffrey D. Kirtner, Note, *English-Only Rules and the Role of Perspective in Title VII Claims*, 73 Tex. L. Rev. 871 (1995); Patrick Wallace, Note, *English-Only Rules in the Workplace: Examining the Need to Balance the Burdens of Proof Under Disparate Impact Analysis*, 7 DePaul Bus. L.J. 223 (1994); Cara D. Helper, Comment, *Enforcing the Equal Employment Opportunity Commission Guidelines on Discrimination Because of National Origin: The Overextension of English-Only Rules in Garcia v. Spun Steak Co.*, 79 Minn. L. Rev. 391 (1994); Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. Mich. J.L. Ref. 265 (1990); Aileen Maria Ugalde, Comment, *"No Se Habla Español": English-Only Rules in the Workplace*, 44 U. Miami L. Rev. 1209 (May 1990); Linda M. Mealey, Note, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 74 Minn. L. Rev. 387 (1989).

[17] *See, e.g.*, R. Geoffrey Dillard, Note, *Multilingual Warning Labels: Product Liability, "Official English," and Consumer Safety*, 29 Ga. L. Rev. 197 (1994); Linda M. Baldwin, Note, *Ramirez v. Plough, Inc.: Should Manufacturers of Nonprescription Drugs Have a Duty to Warn in Spanish?*, 29 U.S.F.L. Rev. 837 (1995); Thomas H. Lee, Note, *A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Consumers*, 47 Vand. L. Rev. 1107 (1994); Kelly (continued...)



and language restrictions and considerations in jury selection.[18]

Moreover, this case is procedurally appropriate for review by this Court. The dispute is not fact-bound and does not require further findings by the district court. The Ninth Circuit construed the Arizona constitutional provision on its face rather than as applied to the specific facts of Respondent Maria-Kelley F. Yniguez.

Finally, in light of the ruling below by an *en banc* vote of the Ninth Circuit, which includes many of the states most likely to adopt and enforce Official English provisions, it is difficult as a practical matter to see how the issues presented by Petitioners could again be brought before this Court for review. This Court should avail itself of the opportunity to decide the issues presented.

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[17] (...continued)
Cox, *The Duty to Warn: Should California Extend the Duty to Include Foreign Language Warnings?*, 1 San Diego Justice J. 517 (1993).

[18] *See, e.g., Recent Case: Constitutional Law — Peremptory Challenges — Third Circuit Holds that Peremptory Challenges Based on Foreign Language Ability do not Violate the Equal Protection Clause — Pemberthy v. Beyer, 19 F.3d 857 (3d Cir. 1994)*, 108 Harv. L. Rev. 769 (1995); Cynthia L. Brown, Note, *A Challenge to the English-Language Requirement of the Juror Qualification Provision of New York's Judiciary Law*, 39 N.Y.L. Sch. L. Rev. 479 (1994); Andrew McGuire, *Peremptory Exclusion of Spanish-Speaking Jurors: Could Hernandez v. New York Happen Here?*, 23 N.M.L. Rev. 467 (1993).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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No. 95-974

# In The Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona;
Maria-Kelley F. Yniguez; Jaime Gutierrez; and
Arizonans Against Constitutional Tampering
*Respondents*

On Petition for a Writ Of Certiorari to the
United States Court of Appeals for The Ninth Circuit

## BRIEF AMICUS CURIAE OF U.S., INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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January 19, 1996

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## INTEREST OF AMICUS

U.S., Inc. is a Michigan non-profit corporation. The corporate purposes, as set forth in its 1982 Articles of Incorporation include: "to educate the general public on the causes and consequences of bilingualism in American society and to assist other organizations in so educating the general public." Amicus and its 25,000 members interested in this issue actively advocate English as the official language of the United States. Amicus does not oppose the use of foreign languages in personal and private contexts. Indeed, Amicus sponsors programs promoting foreign languages (Spanish, French and German), but not for use in official government business.

By constitutionalizing a political question, the 6-5 *en banc* majority below makes Amicus' mission more difficult. Counsel for all parties have consented to the filing of this brief.

## STATEMENT OF CONTEXT

The majority ruling below extends far beyond Respondent Maria-Kelley Yniguez's interest in filing reports in Spanish with her English speaking supervisors. There are 322 languages spoken in the United States. U.S. Bureau of the Census, Document CPH-133, "1990 Census: Languages Spoken at Home and Ability to Speak English for Persons 5 Years and Over", *reprinted* in *The Social Contract*, Winter 1995-1996, Vol. VI, No. 2.). If Spanish, in addition to English, is permissible in government, why not the remaining languages? In a country diverse enough to have 322 spoken languages, some degree of commonality is needed, especially in the mode of communication.

Amicus asks this court to consider the downstream effects of the Ninth Circuit's 6-5 decision on the fundamen-

tal bonds of a nation-state. French Canada is now paying the price for its experiment with language separatism. The bond of a common language is the *unum* amidst a sea of racial, cultural, ethnic and religious *pluribus*. Could Judge Reinhardt's decision have been written in the language of his choice? Should it have been written in Spanish to show "solidarity" with Yniguez? Under our federal system, should the choice of language of Arizona state government be left to the Arizona electorate, or is this a federal-level prerogative? How far should a state go in accommodating 322 languages? How will we decide which of the several possible translations is the most accurate?

Public accountability of government employees is fundamental to our continuing experiment in self-governance. In this case, Respondent Maria-Kelley Yniguez's choice of language on the job compromises her employer's and financial auditor's ability to maintain accountability.

Yniguez claims she speaks a language her supervisor cannot understand because "It's kind of a solidarity thing." Petition for Writ of Certiorari ("Pet."), 2. This is highly-selective "solidarity." Her choice of language will not produce solidarity with co-workers not speaking the language she chooses to use. Rather, misunderstandings with fellow employees are more likely. Such hostilities in a non-governmental workplace gave rise to the dispute in *Garcia v Spun Steak Co.*, 998 F. 2d 1480 (9th Cir., 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 2726 (1994) (mandatory English workplace rule was not discriminatory).

Without some commonality in our units of weights and measures, clocks, calendars, railroad gauges, currency, the 911 emergency call number, and the language of government, we may well find ourselves living in the proverbial Tower of Babel.



## ADDITIONAL REASONS TO GRANT CERTIORARI

### LANGUAGE SEPARATISM IN GOVERNMENT CONFLICTS WITH THE FUNDAMENTAL PURPOSE OF FREE SPEECH UNDER THE FIRST AMENDMENT.

A. The Decision Below Undermines An Important Foundation of Our National Compact.

The 6-5 *en banc* decision below weakens a prominent foundation of our fundamental national compact. Our fundamental national compact includes free speech. Maintaining a "marketplace of ideas" is the historic and fundamental purpose of the First Amendment. Oliver Wendell Holmes' dissent in *Abrams v. United States*, 250 US 616, 630, 40 S.Ct. 17, 63 L.Ed 1173 (1919); *U.S. v. National Treasury Employees Union*, 513 U.S. __, 115 S.Ct. __, 130 L.Ed 2d 964 (1995); *McIntyre v. Ohio Elections Commission*, 514 U.S. __, 115 S.Ct. __, 131 L.Ed 2d 426 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. __, 112 S.Ct. 2538, 120 L.Ed 2d 305 (1992).

This "marketplace" functions best when people use a mutually understood language, and do not require an interpreter. Congress recognized this when it provided, in Arizona's Enabling Act, that all Arizona legislators be able to speak English without the aid of an interpreter. Ariz. Const. Art. XX, § 8.

In *Guadalupe Organization* v. *Tempe Elementary School Dist.*, 587 F. 2d 1022 (9th Cir., 1978) the court held the equal protection clause imposed no duty upon a school district to provide bilingual education to non-English speaking students. Judge Sneed stated: "Linguistic

and cultural diversity within the nation-state, whatever may be its advantages from time to time, can restrict the scope of the **fundamental compact**. Diversity limits unity." 587 F.2d at 1027 (emphasis added). The 6-5 majority below "disapproved" of Judge Sneed's analysis, thus threatening our "fundamental compact."

Judge Reinhardt's decision also conflicts with the official report of the U.S. Senate on the 1986 Immigration Reform Bill. S. Rep. No. 132, 99th Cong., 1st. Sess. 7 (if language separatism rises above a certain level, the unity and political stability of the nation will be "seriously diminished.").

The First Amendment protects "freedom of speech." The use of multiple languages does not free speech, but rather introduces impediments to understanding. The majority below indicates "Article XXVIII obstructs the free flow of information and adversely affects the rights of many private persons by requiring the incomprehensible to replace the intelligible." Pet. at 45a. The majority fails to note that services in languages other than English, at the discretion of an individual employee, might also be "incomprehensible" to others listening to the government. If the majority below were truly concerned with the rights of the public to receive information, Pet. at 44a, it should also have considered the effects of its position on the rights of persons other than the immediate recipient of the message.

When carried to its logical conclusion, the majority below lays the groundwork for a Tower of Babel constructed of (at present count) 322 languages. What began as a "marketplace of ideas" could easily degenerate into a "marketplace of undecipherable messages." Whether a "marketplace of undecipherable messages" is good public policy is not for the Ninth Circuit to decide. This is a political question for the Arizona electorate, not one for the judiciary to freeze into place under the First Amendment.



Fundamentally, the decision of whose rights should be emphasized in the performance of government services is a political choice, a choice which has been disturbed by the 6-5 decision below. The court should review the decision below.

### B. Conflicts with U.S. Supreme Court Precedent on Governmental Speech.

The majority below conflicts with this court's decisions on government's choice of language. As Judge Kozinski's dissent below notes: "*Rust [v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991)] and *Rosenberger [v. University of Virginia*, 63 U.S.L.W. 4702 (U.S. June 29, 1995)] stand squarely for the proposition that the government may write the script when it is the speaker." Pet at 92a. Thus, under *Rust* and *Rosenberger*, the government may select the language it believes contributes most to government comity, efficiency and workplace harmony. Pet. at 78a-79a (Fernandez, J., dissenting), 86a (Kozinski, J., dissenting). Yet, according to the 6-5 majority below, the only choice available to the government is to *encourage* not *compel*, choice of language. Pet. at 59a. This court should review this case to give guidance to lower courts on the proper interpretation of *Rust* and *Rosenberger*.

## CONCLUSION

Amicus respectfully requests this court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 95-974

In the

# Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,
*Petitioners*,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; and ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,
*Respondents*.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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*Respondents*.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

### INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned

citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases concerning First Amendment issues. For example, PLF participated as amicus curiae in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1991), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. ____, 132 L. Ed. 2d 700 (1995), and PLF attorneys, representing petitioners, argued successfully before this Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990).

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience dealing with the First Amendment will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.2, written permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

## STATEMENT OF THE CASE

This case comes to this Court out of a 6-5 *en banc* decision rendered by the Ninth Circuit Court of Appeals, which declared that an Article of the Constitution of the State of Arizona entitled "English as the Official Language" violated the First Amendment rights of a state employee, Maria-Kelley Yniguez. The Article requires that "[t]his State and all political subdivisions of this State shall act in English



and in no other language." Art. XXVIII, § 3(1)(a). Ms. Yniguez is fluent in both Spanish and English. After passage of the initiative making Article XXVIII a part of the State Constitution, she ceased using Spanish in the course of her job with the Arizona Department of Administration, where she was hired to process insurance claims against the state. Previously, Ms. Yniguez had spoken in Spanish to the Spanish-speaking members of the public with whom she dealt. Ms. Yniguez also desired to execute claim settlements in Spanish, so that Spanish-speaking claimants could read them. Ms. Yniguez' supervisor does not read or speak Spanish.

Ms. Yniguez' brought this present action in federal District Court against the State of Arizona, then-Governor Mofford, the Arizona Attorney General, and the Director of the Department of Administration, alleging a violation of her right to free speech under the First Amendment to the Constitution of the United States. At no time had defendants sought enforcement of Article XXVIII against Ms. Yniguez. Rather, Ms. Yniguez sought declaratory and injunctive relief on the basis that Article XXVIII was facially overbroad. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 925 (1995).

On jurisdictional grounds, all defendants to the action were dismissed except for Governor Mofford. *Id.* After plaintiff prevailed, Arizonans for Official English sought intervention as defendants and appellants when Governor Mofford chose not to appeal. *Id.* at 926. Arizona's Attorney General also intervened at the Ninth Circuit for the limited purpose of arguing the constitutionality of Article XXVIII. *Id.* Although defendant Mofford and, later, the Attorney General, pointed out that the interpretation of Article XXVIII had not been ascertained by a controlling state appellate court, both the District Court and the Ninth

Circuit denied defendants' motions for abstention and certification to Arizona state court on the premise that the Article was "not susceptible of a narrowing construction" distinct from the federal court's interpretation. *Id.*

After finding its exercise of jurisdiction appropriate, the Ninth Circuit upheld the District Court's decision that Article XXVIII violated the First Amendment. It determined that plaintiff's decision to speak Spanish, in the context of conveying information from the state to the public, constituted speech of "public concern" entitled to First Amendment protection, *id.* at 940, and that Arizona's countervailing interest in "protecting democracy by encouraging 'unity and political stability;' [and] encouraging a common language," *id.* at 944, were not sufficiently important, nor sufficiently served by the Article's implementation, to outweigh plaintiff's First Amendment rights.

## SUMMARY OF ARGUMENT

Despite the Ninth Circuit's assertion that Article XXVIII's plain language states the broadest possible proscription against the use of any language other than English, the Article is sufficiently ambiguous, even accepting a plain language interpretation, that the Ninth Circuit should have refrained from exercising jurisdiction until a controlling state court had interpreted the Article under Arizona state law. Because the Article's own definitional section leaves sufficient room to address the First Amendment concerns raised by the Ninth Circuit, issuing the decision was both premature and unwarranted.



Further, even if the Ninth Circuit's interpretation of Article XXVIII is accurate, plaintiff's desire to speak Spanish to members of the public while engaged as a state employee in the conduct of state business is not a speech interest entitled to First Amendment protection. This Court has qualified public employee free speech rights with certain requirements, among them that the speech be made by the employee as a citizen, that the speech address a matter of public concern, and that the employee's free speech rights outweigh the state's countervailing interest in applying its policy. Although the Ninth Circuit attempts to leverage plaintiff's argument into established precedents, plaintiff's position is not analogous to cases previously addressed by this Court for a number of reasons, not the least of which is that the state restriction at issue here is a ban on the choice of language spoken, not the specific import of the words.

Because plaintiff does not meet this Court's previously enunciated requirements to establish that her own or others' First Amendment rights were chilled by implementation of Article XXVIII, this Court should grant petitioner's writ of certiorari to address the broad expansion of First Amendment protections created by the Ninth Circuit's line of reasoning.

## ARGUMENT

### I

### BECAUSE ARTICLE XXVIII IS CAPABLE OF AN ALTERNATIVE CONSTRUCTION, ABSTENTION BY THE NINTH CIRCUIT IS PROPER IN THIS CASE

Petitioners raise separately the issues of statutory interpretation and federalism. Petition for Writ of Certiorari at 20-22. Because that portion of the Ninth Circuit's opinion

dealing with the statutory construction of Article XXVIII establishes that court's grounds for declining to abstain, amicus believes that the propriety of abstention, based purely on the question of statutory construction, is fairly included in the petition for writ of certiorari. Because it is a state constitution that is being construed, amicus believes that the question of abstention and certification to state court presents a unique and significant federalism issue in the present case, and urges this Court to address it directly.

The doctrine of abstention is based upon the principle that federal courts should respect the competence of state courts to construe their own statutes consistently with the requirements of the federal Constitution. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). While the relative importance of First Amendment considerations dictate that abstention should be exercised cautiously in cases raising free speech issues, *Zwickler v. Koota*, 389 U.S. 241 (1967), where a question concerns the constitutionality of a state law, federal courts should abstain if the state law is uncertain or unsettled, or where the state law may be interpreted in such a way as to materially alter the federal constitutional question. *Procunier v. Martinez*, 416 U.S. 396 (1974). In this case, while the Ninth Circuit gave consideration to these federalism principles, *Yniguez*, 69 F.3d at 930, it erroneously concluded that the state law at issue, Article XXVIII, was not capable of an alternative construction which would have materially altered the federal constitutional question before it.

In interpreting Article XXVIII, the Ninth Circuit placed primary emphasis upon Section 3(1)(a), which provides that "[t]his State and all political subdivisions of this State shall act in English and no other language." In



construing this provision, the Ninth Circuit expressed its agreement with the District Court that "[t]he article's plain language broadly prohibits all government officials and employees from speaking languages other than English in performing their official duties, save to the extent that the use of non-English languages is permitted pursuant to the provision's narrow exceptions section." *Yniguez*, 69 F.3d at 931.

By its terms, Article XXVIII's broad proscriptions apply to:

> (i) the legislative, executive and judicial branches of government,
>
> (ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,
>
> (iii) all statutes, ordinances, rules, orders, programs and policies,
>
> (iv) all government officials and employees during the performance of government business.

Section 1(3)(a). Because of this seemingly all-encompassing language, the Ninth Circuit determined that

> [e]ven a cursory reading of Article XXVIII demonstrates that the provision is an integrated whole that seeks to achieve a specific result: to prohibit the use in oral and written

> communications by persons connected with the government of all words and phrases in any language other than English.

*Yniguez*, 69 F.3d at 933. Unfortunately, it appears that the majority of the Ninth Circuit performed only just such a "cursory reading." Article XXVIII does not, on its face, employ such a sweeping proscription.

In rejecting the Arizona Attorney General's opinion, which attempted to limit the Article's coverage to only "official" acts rather than all acts of state employees, the Ninth Circuit applied a "plain language" standard to the Article. *Id.* at 929. However, in not finding the Attorney General's interpretation persuasive, the majority failed to appreciate that its own interpretation was not the only conceivable "plain language" interpretation. Specifically, Section 1, which describes to whom the Article applies (see above), *qualifies* its coverage in subsection (3)(b): "As used in this Article, the phrase '[t]his state and all political subdivisions of this State' shall include every entity, person, action or item described in this Section, *as appropriate to the circumstances*." (Emphasis added.)

While Arizona courts could still construe Article XXVIII as strictly as the Ninth Circuit, the First Amendment concerns raised by the Ninth Circuit could have been avoided by an alternative interpretation through application of that phrase. Rather than read the phrase "as appropriate to the circumstances" as implying some reasonable limitations upon the English-only provision of Article XXVIII, however, the Ninth Circuit chose instead to ignore its implications entirely, necessarily leading the majority to envision the absurd:



> The article effectively requires that [bilingual] employees remain mute before members of the non-English speaking public who seek their assistance. At such moments of awkward silence between government employees and those they serve, it will be strikingly clear to all concerned that vital speech that individuals desire both to provide and to hear has been stifled by the state.

*Id.* at 942. It is eminently possible that Arizona state courts could avoid such concerns by finding that speaking a non-English language is "appropriate" in a host of situations, including, quite obviously, situations where speaking English is of absolutely no communicative value.

Further, contrary to the majority's claim that Article XXVIII is intended to "prohibit the use in *all oral and written communications by persons connected with the government* of all words and phrases in any language other than English," *id.* at 933 (emphasis added) the act applies to "government officials and employees *during the performance of government business*." Section 1(3)(a)(iv) (emphasis added). Not all communications from and between government employees necessarily constitute "government business."

Lastly, the Ninth Circuit held Article XXVIII invalid in its entirety, on the basis that it is overbroad and contains no severability provision. *Id.* at 933-34. It is true that Article XXVIII contains no specific severability provision. However, Section 3(2) of Article XXVIII does provide exceptions to the application of its English-only requirements; among these is "(b) to comply with other federal laws." Under the majority's reading of Article XXVIII, the First Amendment to the Constitution of the

United States does not constitute one of the "federal law[s]" contained within this exception. While it may not be textually clear that the First Amendment is implied by the "federal law" exception, comity considerations would seem to militate in favor of abstention so that controlling Arizona state courts would at least be given the opportunity to define the parameters of the constitutional requirements inherent in their own state law.

While federal courts have wide discretion as to when they may choose to abstain from resolving a federal constitutional question,

> [w]here resolution of the federal constitutional question is dependent upon, or may materially be altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.

*Harman v. Forssenius*, 380 U.S. 528, 534 (1965) (citations omitted). This Court should grant the petition for certiorari to address whether the Ninth Circuit's exercise of jurisdiction and issuance of an opinion on the merits of respondent's claim is consistent with the federalism principles that would dictate abstention.



## II

## RESPONDENT'S USE OF A FOREIGN LANGUAGE IS NOT ENTITLED TO FIRST AMENDMENT PROTECTION

### A. In Order to be Entitled to Protection Under the First Amendment, Respondent's Speech Must Meet the Requirements Enunciated by This Court Pertaining to Public Employees

Article XXVIII does not purport to ban the use of non-English languages by citizens throughout the State of Arizona. And, contrary to the statement by the Ninth Circuit, it does not even apply to all "persons connected with the government." *Yniguez*, 69 F.3d at 933. Rather, Article XXVIII's language restrictions apply only to state "officials and employees during the performance of government business." Section 1(3)(a)(iv). As such, the applicable First Amendment test, and the test that was applied by the Ninth Circuit in this case, is that applied by this Court pertaining to public employee speech.

This Court enunciated the standards by which government could regulate employee speech in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563 (1968). That case dealt with whether a local school board had violated a teacher's First Amendment rights by discharging him based upon a letter he had sent to a local newspaper. This Court stated that

> it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The

> problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

*Pickering*, 391 U.S. at 568. The balancing test defined by *Pickering* has been applied consistently by this Court in public employee speech cases since. *See, for example, Connick v. Myers*, 461 U.S. 138 (1983), *Rankin v. McPherson*, 483 U.S. 378 (1987), *Waters v. Churchill*, 511 U.S. ____, 128 L. Ed. 2d 686 (1994), *United States v. National Treasury Employees Union*, 513 U.S. ____, 130 L. Ed. 2d 964 (1995). Therefore, in assessing the speech at issue in this case, relevant considerations include whether: (1) respondent is speaking as a citizen; (2) the speech relates to a matter of public concern; and (3) the state's interest as an employer is outweighed by respondent's interest in engaging in the restricted speech.

### B. This Court Should Clarify That the Public Employee Speech Doctrine Does Not Apply Where the Employee Does Not Speak as a Citizen

The cases that have come before this Court under the category of public employee speech have uniformly related to restrictions on speech *not* part of the employee's official functions. In *Pickering*, the Court held this distinction to be significant

> in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher,



> we conclude that it is necessary to regard the teacher *as the member of the general public he seeks to be*.

391 U.S. at 574 (emphasis added). Likewise, speech restrictions disfavored by this Court have generally involved employee speech outside of the employee's official duties. ("When a public employee speaks ... as an employee upon matters only of personal interest ..., a federal court is not the appropriate forum in which to review the wisdom of a personnel decision." *Connick*, 461 U.S. at 147.)

In stark contrast, Article XXVIII's non-English restriction applies only where respondent is *not acting as a citizen*, but instead where she *represents only the state*. Indeed, Article XXVIII specifically excludes all of respondent's private speech and even speech between her co-workers when she is not engaged in "the performance of government business." Section 1(3)(a)(iv). Paradoxically, in the same section in which the Ninth Circuit majority avers that "the government would normally have the authority to determine the tasks that it asks its employees to perform and to dictate the content of the messages that it wishes its employees to communicate to the public," *Yniguez*, 69 F.3d at 940, the Ninth Circuit finds that the speech at issue is *more* entitled to First Amendment protection by virtue of the fact that "here the employee is not simply commenting on a public issue but in speaking *is actually performing his official duties*." *Id.* at 939 (emphasis added). This is in direct conflict with the purpose behind asserting individual protected rights, particularly First Amendment free speech rights: Respondent has no personal stake in the speech she is uttering, and she cannot bootstrap official state speech into personal speech by virtue of the fact that government speech frequently relates to matters of public concern.

Just last term, this Court announced:

> [W]hen the State is the speaker, it may make content-based choices. ... [W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.... We recognize[] that when the government appropriates pubiic funds to promote a particular policy of its own it is entitled to say what it wishes.

*Rosenberger v. Rectors and Visitors of the University of Virginia*, 132 L. Ed. 2d at 718. This Court should resolve the issue of whether an individual's right to free expression under the First Amendment is properly exercised within the context of state, not citizen, speech.

### C. This Court Should Clarify the Principle That "Speech of Public Concern" Relates to Content, Not the Medium of Expression

The Ninth Circuit misconstrued the "public concern" prong of the *Pickering* balancing test in arriving at its conclusion that respondent's speech constituted speech of public concern. The court concluded:

> The employee speech banned by Article XXVIII is unquestionably of public import. It pertains to the provision of governmental services and information. Unless that speech is delivered in a form that the intended recipients can comprehend, they are likely to be deprived of much needed data as well as of substantial public and private benefits. The speech at



> issue is speech that members of the public desire to hear.

*Yniguez*, 69 F.3d at 940. However, the desire of the public to receive information in a language they can understand is factually and conceptually distinct from this Court's prior pronouncements about speech of public concern. Respondent was hired to process insurance claim forms. While there is no doubt a public interest in insurance claims against the state as a general matter, and while the content of any particular claim is certainly of relative importance to the person who is filing such a claim, the actual content of any particular claim form processed by respondent does not amount to a matter of public concern in the context of First Amendment analysis. As a practical matter, the content of any such form may in fact be highly private in nature.

The Ninth Circuit attempts to blur the distinction between the medium used--the choice of language--and the message sought to be conveyed--meaningful content of the words. In so doing, the opinion effectively obliterates the public concern prong of the *Pickering* test, instead transforming the public concern about the functioning of government into the public's "right to receive" information from the government. *Yniguez*, 69 F.3d at 941.

Surprisingly, the Ninth Circuit relies heavily upon *United States v. National Treasury Employees Union* for this proposition. Quoting from *Treasury Employees*, the court states:

> "The large-scale disincentive to government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said."

> ... Thus, *National Treasury Employees Union* makes it clear that public employee speech doctrine weighs heavily the public's "right to receive information and ideas" by affording First Amendment protection to speech that the public has an interest in receiving.

*Yniguez*, 69 F.3d at 942 (citation omitted). But *Treasury Employees* does not declare that the public's desire to hear information elevates that desire, by itself, into an interest entitled to First Amendment protection. *Treasury Employees* dealt with a law banning honoraria for speeches given by government employees; as such, the Court presumed that certain members of the public were interested in hearing such speech because they were obviously willing to pay for it. But this Court in no sense found that the public interest in an employee's speech simply entitled that speech to First Amendment protection. Instead, this Court's holding that the ban was overinclusive was based on the finding that the ban reached matters that were *not government related*:

> Because the vast majority of the speech at issue in this case does not involve the subject matter of government employment and takes place outside the workplace, the Government is unable to justify [the ban] on the grounds ... asserted in *Pickering* ....

*Treasury Employees*, 130 L. Ed. 2d at 982. In other words, contrary to the Ninth Circuit's extrapolation of its reasoning, *Treasury Employees* implied that, had the ban applied to the subject of government employment or the government workplace (as it does in the present case), it would have been upheld regardless of the public's desire to hear the speech at issue.



This Court should grant certiorari to decide the question of whether the "public concern" prong of the public employee speech doctrine extends First Amendment protection beyond expressive content to the medium of expression used, purely on the basis that the public prefers an alternative medium.

### D. This Court Should Determine Whether Arizona's Interest in Unity and Political Stability, as Promoted by Article XXVIII, Is Entitled to Deference by the Federal Judiciary

Under the *Pickering* test, this Court has traditionally balanced the interests of the public employee in expressing himself against the state's interest in "the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 817. The state interest asserted in the present case is not efficiency, but rather "protecting democracy by encouraging 'unity and political stability'; encouraging a common language; and protecting public confidence." *Yniguez*, 69 F.3d. at 944.

Initially the Ninth Circuit found that petitioners should "lose by default" under the traditional test, since the language restriction did not promote state interests in "efficiency and effectiveness." *Id.* at 943. However, the court did undertake to evaluate the asserted state interests in unity and political stability on the basis that other state interests *might* be legitimate bases for state regulation. *Id.*

While ostensibly giving credence to the state's asserted interest, the Ninth Circuit ultimately concluded "[w]e cannot agree that Article XXVIII is in any way a fair, effective, or appropriate means of promoting [the state's] interests." Unfortunately, its conclusion ultimately dealt less with the weight of the asserted state interest than in passing its own

judgment upon whether the state's interests were desirable and whether the means chosen by the state were the best for serving those interests. In support of its position, the Ninth Circuit cited *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court in that case made it clear that a state law banning foreign language instruction in *private* schools to further the state's interest in "foster[ing] a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters" was arbitrary, and could not withstand *due process* scrutiny *as applied*. *Meyer*, 262 U.S. at 402-03. But the Court explained:

> The power of the state to ... make reasonable regulations for all schools, *including a requirement that they shall give instructions in English*, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum *for institutions which it supports*.

*Id.* at 402 (emphasis added). Contrary to the Ninth Circuit's reading of that case, this Court did not determine that language-ban laws were inherently arbitrary. Instead, it found that there was not a sufficient relationship between promoting American ideals and banning foreign languages to justify the state's intrusion into the private domain.

In the present case, it is difficult to imagine that the asserted state interest in "encouraging a common language" would not be well served by a statute making English the official language of the state. Moreover, Arizona's ban applies only to speech for which it pays. This Court should grant certiorari in order to decide whether Arizona is entitled to define and promote its own state interests in the manner it has chosen; a manner, moreover, which affects only the operation of its own state functions.



## CONCLUSION

Article XXVIII was made part of the Constitution of the State of Arizona by a popular vote of the people of the state. It reflects their will that state officials and employees be united by a common language: English. To accommodate unanticipated situations in which the exclusive use of English would not always be appropriate, Article XXVIII also provides for the use of non-English languages under certain circumstances. The Ninth Circuit determined that it was not possible for the Article to be interpreted in such a way that it would pass First Amendment scrutiny, despite the fact that the Article contained terms unsettled by Arizona state law which would materially alter the federal constitutional question addressed by the court.

The majority of the Ninth Circuit clearly does not favor Article XXVIII's language restriction. However, its task as a federal court is not to pass upon the wisdom or desirability of Article XXVIII; rather, its responsibility is to determine whether the First Amendment entitles respondent and others similarly situated to ignore the dictates of Article XXVIII. While the court purportedly analyzed respondent's challenge on the basis of settled First Amendment law regarding public employee speech, it nevertheless departed from established First Amendment jurisprudence to craft a rationale to support its finding.

The majority acknowledged its departure from settled law in some telling passages of its opinion, stating in its conclusion that

> the diverse and multicultural character of our society is widely recognized as being among our greatest strengths. Recognizing this, we

> have not ... tried to compel immigrants to give up their native language; instead, we have encouraged them to learn English. The Arizona restriction on language provides no encouragement, however, only compulsion: as such, it is unconstitutional.

*Yniguez*, 69 F.3d at 948. However worthy cultural diversity is as a social value, this Court has never held that preservation of that diversity implicates First Amendment protections. Article XXVIII in no way restricts the political, intellectual, or social import of speech--the values which this Court has deemed central to First Amendment interests.

To establish the applicable standards by which public employee speech may be constitutionally regulated in the context of a foreign-language restriction, this Court should grant petitioner's writ of certiorari.

DATED: January, 1996.

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*IN THE*
*SUPREME COURT OF THE UNITED STATES*
October Term, 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

*v.*

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

*On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit*

# BRIEF OF FLA-187 COMMITTEE, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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# BRIEF OF FLA-187 COMMITTEE, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

## INTEREST OF THE AMICI CURIAE

The **FLA-187 Committee, Inc.**, located in Boca Raton, Florida, and founded in April, 1995, is a non-profit corporation engaged in grassroots political activity in the State of Florida. The Committee registered as a "political committee," and in May, 1995, filed four proposed amendments to Florida's Constitution with the Secretary of State. One of the amendments bears the title "Governmental Implementation and Utilization of Official English," and by its express terms will amend Article II, Section 9 of the state constitution. Distribution of the amendment petitions began in mid-1995, and literally hundreds of grassroots volunteers have collected thousands of signatures from Florida's registered voters as of this date. The FLA-187 Committee believes that the Ninth Circuit Court of Appeals' ruling in the instant matter, if not reviewed by this tribunal, will have a chilling effect on political activists throughout the nation who are utilizing the initiative and referendum process to implement or strengthen their state's "Official English" laws. *All parties have consented to the filing of this Brief.*

**Citizens of Dade United** ("CODU"), a non-profit corporation based in Miami, Florida, is also engaged in grassroots political activity in the State of Florida. Incorporated in 1980, CODU was instrumental in distributing and collecting a sizable number of the more than 300,000 petition signatures needed to place the original "Official English Amendment" on Florida's General Election Ballot in 1988; members also devoted thousands of hours to the passage of the amendment, now codified as Article II, Section 9, of the Florida Constitution. CODU's membership provided guidance in the 1995 drafting of the proposed FLA-187 amendment relating to "Official English," and has assisted in the collection of petitions relating to said amendment.



The **California Coalition for Immigration Reform** ("CCIR"), headquartered in Huntington Beach, California, is an incorporated grassroots political organization which serves as an umbrella organization for some 24 grassroots groups in 5 states which are concerned with the influx of legal and illegal immigrants into the western United States, and with the assimilation of new arrivals into the American mainstream. CCIR was a sponsoring organization of California's Proposition 187 in 1994, and is currently in the process of drafting a citizen's initiative similar in scope and effect to Arizona Constitution Article XXVIII, the subject of the instant case. CCIR is cognizant of California's presence within the Ninth Circuit's jurisdiction, and seeks review of this decision in view of its direct impact on all grassroots activists living in states on the West Coast.

The **Freedom Forum** ("Forum") is an unincorporated association based in Montgomery, Alabama, serving as an umbrella organization for grassroots political groups within Alabama. The Forum has conducted research into the growing non-English speaking population within the state, and has commenced with the drafting of legislation for consideration by state legislators. The Forum is concerned that the Ninth Circuit's decision in *Yniguez* will have a substantially negative impact on proposed legislative or constitutional revisions relating to Official English.

## SUMMARY OF ARGUMENT

The *amici curiae* supporting the petition for the granting of a writ are all grassroots political organizations with a deep concern for the nationwide impact of the ruling by the Ninth Circuit Court of Appeals in *Yniguez*.

The *amici* have set forth the historical context for the utilization of the initiative process in the United States. The dynamic level of growth in its use, and even the support for a national initiative, underscore the initiative process' critical place on the modern political landscape. The 1988 Arizonans for Official English campaign is highly illustrative of the enormous effort expended by countless volunteers in placing the measure on the ballot and guiding its passage; all this, on a political issue of deep concern to virtually all Americans - assimilation of immigrants and the preservation of a common language.

The district court and court of appeals issued rulings in *Yniguez* setting forth new modes of First Amendment doctrinal analysis, based upon ethereal constitutional underpinnings. Both tribunals failed to distinguish recent Supreme Court rulings concerning a state's ability to control employees when they speak for that state.

Grassroots political activists around the nation are seeking protection for their efforts from federal judges who desire to substitute the court's judgment for those of "the people" in the political arena, perhaps by this Court's delineation of a precise standard of review for analyzing citizen-sponsored initiatives. All branches of government should be ever-mindful that they derive "their just powers from the consent of the governed."



## ADDITIONAL REASONS FOR GRANTING THE WRIT

### I. THE POWERS RESERVED TO THE PEOPLE SHOULD NOT BE ABROGATED BY THE UNWARRANTED EXPANSION OF CONSTITUTIONAL DOCTRINE

The matter *sub judice* touches directly upon Article XXVIII of the Arizona Constitution, but casts an indirect shadow over the efforts of hundreds of thousands of grassroots political activists, past and present, who have participated in majoritarian democracy at its most basic level. The majority opinion of the *Yniguez* tribunal, particularly its creation of several new First Amendment litmus tests which interfere with state governmental operations, will have far-reaching effects at every level of the political process, and a review of *Yniguez* by this court is fully deserved by the citizens of this nation.

#### A. Historical Context: Participation by the People Through Initiatives

The "people" and the "states" are the repository of all powers not specifically delegated to the United States. U.S. Constitution, amend. X ; 2 J. Story, *Commentaries on the Constitution of the United States*, 652 (5th ed. 1891). The "right of the people" to communicate with the government directly and to engage in direct democratic action is constitutionally safeguarded by the First Amendment's prohibition against the enactment of any law abridging the

right "to petition the [g]overnment for a redress of grievances." U.S. Constitution, amend. I.

From the same analytical wellspring from which the right to petition arose came the direct participation of the citizenry in constitutional conventions and in the ratification process during this nation's founding period. T. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 12-20 (1989). Beginning in the latter 19th century, some two dozen states have adopted the Swiss-style constitutional initiative mechanism, and variations are highly popular throughout the U.S. today. Collins and Oesterle, *Structuring the Ballot Initiative*, 66 U. Colo. L. Rev. 47, 54 (1995).

Through the enactment of measures providing for a system of initiative and/or referendum, the electorate obtains the means to directly propose laws or amendments to a state's constitution. See Ariz. Const. art. XXI; Fla. Const. art. 11, sec. 3. It was intended that the initiative process would empower "the people," indeed, that the initiative would serve as "a way around monied influence on elected representatives ... would thrust from power the Captains of Greed." Collins, *supra*, at 56. In view of the chronic lack of financing suffered by the grassroots organizations which typically advance initiative campaigns, the enormous petition-drives necessary to gather signatures for ballot access, and the typical presence of unpaid grassroots volunteers rather than paid political operatives in most campaign positions, it is not unrealistic to characterize these campaigns as the quintessence of participatory democracy.



## B. Current Grassroots Citizen-Based Political Participation

A dynamic grassroots volunteer-based effort is essential in most modern initiative campaigns; this characterization would fit not only petitioner Arizonans for Official English's 1988 Campaign for Proposition 106 (now codified as Article XXVIII), but the 1994 California Proposition 187 campaign by *amicus* C.C.I.R. and the current *amicus* FLA-187 Committee's Official English campaign, in addition to numerous other grassroots citizen-based initiative drives over the past decade.

The thirst for an increase in direct democratic participation has grown throughout this century; in 1988 California voters received explanatory pamphlets on proposed state, county and local amendments, initiatives and laws. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1508-09 (1990). Further, two-thirds of persons questioned in a 1983 Gallup survey indicated support for direct citizen-review of state and local laws, while polls conducted in 1978, 1981, and 1987 all supported a constitutional amendment for a national initiative by a more than two-to-one margin. *Id.* at 1507 n. 16.

## C. Citizen-Based Political Decision-Making and the Yniguez Rulings

In the 1988 Arizona Proposition 106 campaign, the Arizonans for Official English, its supporters and grassroots volunteers were required to obtain by initiative petition the signatures of "a number of qualified electors equal to fifteen per centum of the total number of votes for all candidates for Governor at the last preceding general election." Ariz. Const. art. XXI, sec. 1. This requirement

amounted to thousands of voter signatures, the collection of which took an enormous effort by hundreds of volunteers and paid signature gatherers over many months, followed by an arduous election campaign. The issue was debated throughout the state, on a topic of national political significance: the creation of incentives for immigrants to assimilate rapidly, and prevent the estrangement of linguistic groups, so familiar to those who have studied Belgium, Africa, Canada, China, the Balkans and other bilingual or multilingual areas.

Despite the political will of the people of Arizona, as expressed in the November, 1988 election, a state employee immediately filed suit in federal court alleging deprivation of constitutionally-protected rights, including abridgement of her freedom of speech.

The trial court, in its 1990 ruling on the constitutional claim, did not even mention any regret that the electoral expression of "the people's will" was to be subordinated to the First Amendment claim advanced by plaintiff Yniguez; indeed, except for bare mention of the general election, the direct participation of Arizona's citizenry in this matter goes unmentioned. *See Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990).

In deciding that Article XXVIII was facially overbroad, Circuit Judge Reinhardt's majority opinion delineates several new constitutional doctrines, including the assertion that the regulation of choice of language by the state for public employees is tantamount to regulation of speech content. *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 934-36 (9th Cir. 1995). In framing additional new constitutional standards, the court opined that the individual decision of an employee or elected official regarding "best interests" will serve as the benchmark for the constitutional analysis of State-



mandated public language choices, *id.* at 937, and also that the fact that speech occurs as part of the performance of a public employee's job functions is not conclusive in terms of control, but instead the State's right to control that speech must undergo a balancing test, *id.* at 940.

The *Yniguez* majority failed to distinguish this Court's recent ruling that "the government as employer has far broader powers than does the government as sovereign ... [that in] many situations ... the government must be able to restrict its employees' speech ... [and] many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." *Waters v. Churchill* ___U.S.____ , 114 S.Ct. 1878, 1886 (1994). As noted in Judge Fernandez' *Yniguez* dissenting opinion, this Court has held that a state, when it is the speaker, "may make content-based choices." *Yniguez*, 69 F. 3d at 957 (Fernandez, J., dissenting) *quoting Rosenberger v. Rector and Visitors of Univ. of Va.*, ____U.S.____, 115 S. Ct. 2510, 2518-19 (1995). Further, the *Rosenberger* court opined "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 115 S. Ct. at 2519, *citing Rust v. Sullivan*, 500 U.S. 173, 194, 111 S. Ct. 1759, 1773 (1991).

Grassroots political organizations working on initiative campaigns believe that the *Yniguez* majority objected to Article XXVIII on the basis of political philosophy, and in effect substituted the majority's view on multilingualism for that of the voters of Arizona. This issue is decidedly political, and neither Ms. Yniquez nor recipients of public services have a constitutional basis for deciding the mode of delivery. The *Yniguez* majority's analysis has ignored "the difference

between a government employee who contributes to the marketplace of ideas and an employee who speaks in a mode which helps the members of public [in] understanding what he says." *Yniguez*, 69 F.3d at 960 (Wallace, C.J., dissenting), *citing United States v. National Treasury Employees Union*, ____U.S. _____, 115 S. Ct. 1003, 1015 (1995).

## D. The Need to Grant the Petition for Writ of Certiorari

The Issuance of a Writ of Certiorari by the Court is important to grassroots political activists, and indeed, to the nation as a whole, to preserve the sense that all segments of the American political spectrum have a voice in the governance of this nation. As noted by Chief [then Associate] Justice Rehnquist, "[i]f we do not likewise contain the courts, in some way, from negating a law that, although unwise in the eyes of some, is nonetheless rendered unconstitutional only by a considerable stretch of judicial imagination, we risk a repetition of what one of my predecessors on the Supreme Court referred to as 'Judicial Supremacy'." W. Rehnquist, *Point, Counterpoint: The Evolution of American Political Philosophy*, 34. Vand. L. Rev. 249, 263 (1981). As noted by Professor Eule, "[a] nation that trace power to the people's will does not easily digest the practice of unelected and unaccountable judges denying the populace what most of them appear to want." Eule, *supra*, at 1504.

This begs the question as to just what standard of review should be utilized by lower federal courts analyzing claims similar to that brought by the public employee in this case. The *amici* assert that when a state constitutional provision which has been enacted *directly by the people* is



challenged, and the provision deals directly with services provided by the state, a more deferential standard of review should be utilized. This would give effect to the Supreme Court's acknowledgment that state laws which provide for initiative and referendum "demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James v. Valtierra*, 402 U.S. 137, 141 (1971). "Under our constitutional assumptions, all power derives from the people ... [and] the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *Eastlake v. Forest City Enterprises*, 426 U.S. 668, 672 (1976) (Burger, C.J.) (citations omitted).

This Court should provide guidance to lower federal courts, and should admonish them to exercise exceptional care during the review of a citizen-based initiative; those initiatives that bear a reasonable relationship to traditional state objectives, and which do not trample well-settled individual liberties, should be shielded from judicial whim.

It has been noted that, abstract theories of sovereignty and democracy aside, "[a] judicial decision striking down a voter effort also risks engendering a perception by the public itself that its will has been subverted." Eule, *supra*, 99 Yale L.J. at 1506. Just such a perception has arisen in Arizona because of the *Yniguez* decisions, in California because of the trial court's decision in *LULAC v. Wilson*, No. CV 94 - 7569 MRP (C.D. Cal. Nov. 20, 1995) [Proposition 187 decision], and elsewhere in the nation. We would do well to recall the Declaration of Independence's assertion that governments derive "their just powers from the consent of the governed."

## CONCLUSION

For the reasons stated, the Court should grant the Petition for a Writ of Certiorari.

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On Petition for a Writ Of Certiorari to the
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## BRIEF AMICUS CURIAE OF ARIZONA LEGISLATORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## Interest of Amici

Amici curiae are 39 members of the Arizona Legislature: President of the Senate John Greene, Speaker of the House of Representatives Mark Killian, Senate Majority Leader Thomas C. Patterson, House Majority Leader J. Ernest Baird, Senate Majority Whip Janice K. Brewer, House Speaker *Pro Tem* Donald Aldridge, Senators Stan Barnes, Keith Bee, Brenda Burns, Larry Chesley, Randall Gnant, John Huppenthal, John Kaites, Patricia Noland, David Petersen, Gary Richardson, Marc Spitzer, Carol Springer and Warren Austin Turner, and Representatives Carolyn Allen, Robert Blendu Sr., Russell Bowers, Fulton Brock, Scott Bundgaard, Robert Burns, David Farnsworth, Jeff Groscost, Winifred Hershberger, Marilyn Jarrett, Wes Marsh, Bill McGibbon, Jean McGrath, Paul Mortensen, Jerry Overton, Dan Schottel, Robin Shaw, Tom Smith and James Weiers. On the advice of the Clerk, this brief is filed on behalf of the named Arizona legislators, without consent of the parties.

This case affects amici's ability to develop, enact, and oversee enforcement of the laws of Arizona, including the ability of the State to determine important public policies. In addition, because the 6-5 *en banc* majority opinion below grants sweeping rights for public employees to sue the State under the First Amendment, amici are vitally interested in review of this matter to determine the ultimate fiscal impact on the State.

The State of Arizona was denied a complete right to appear in this case. *Yniguez v. Arizona*, 939 F.2d 727, 740 (9th Cir. 1991). Legislators have a right to protect their legislative interests. *Coleman v. Miller*, 307 U.S. 433, 438 (1939)(protected interest in vindicating vote); *Karcher v. May*, 484 U.S. 72, 84 (1987)(legislature may defend constitutionality of statute attacked in federal court).

## ADDITIONAL REASONS TO ISSUE THE WRIT

This Court has granted *certiorari* to review interference with a State's rights and powers. *New York v. United States*, 505 U.S. 144 (1992)(States are not appendages of federal government). "[I]n many articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, is distinctly recognized." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869). A State's choices in conducting its own affairs are "function[s] essential to [States'] separate and independent existence." *Coyle v. Oklahoma*, 221 U.S. 559, 595 (1911). *See also, New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

A government may promote a position without infringing the rights of persons who disagree or wish to exercise their own free speech rights. *Maher v. Roe*, 432 U.S. 464, 474 (1977)(State may make a value judgment and allocate public funds to implement that judgment). As this Court said in *Rust v. Sullivan*, 500 U.S. 173, 194 (1991), "To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternate goals, would render numerous government programs constitutionally suspect." This Court would not adopt that position: "Petitioners' assertions ultimately boil down to the position that if the government chooses to subsidize one protected right, it must



subsidize analogous counterpart rights. But the Court has soundly rejected the proposition." *Id.*

What the government may do through funding, it may also do by allocating staff and other public resources. *Webster v. Reproductive Health Services*, 492 U.S. 490, 510 (1989). Thus, Arizona could make a language choice for official actions, subsidize its choice by allocating resources and staff, and choose to allocate resources to the use of other languages only in a few cases. That is exactly what Article XXVIII does, and with good reason:

> Arizonans speak dozens of languages, enriching the lives of all its citizens, but complicating decisions about governmental services. For example, how could Arizona respond to service requests in Spanish and not in several of the native American languages that so enrich the State? Arizona would have to either print documents in numerous languages or provide instantaneous translation.

This could be an enormous burden, and courts have consistently refused to order such language assistance. *See, e.g., Frontera v. Sindell*, 522 F.2d 1215, 1219 (6th Cir. 1975)("In order to accommodate all nationality groups, the city might be compelled to establish a department of languages with a staff of linguists to translate the tests and supervise them"); *Vialez v. New York City Housing Auth.*, 783 F.Supp. 109, 124 (S.D.N.Y. 1991)("To accept plaintiff's contention that as a constitutional – rather than legislative – matter, plaintiff has a right to have certain documents written in Spanish would place an insurmountable and unjustified burden on the Housing Authority.").

Before the 6-5 *en banc* majority's decision, the First Amendment did not determine a State's choice of language: "Such matters are for the people to decide." *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978). The

6-5 *en banc* majority, however, has now "disapproved" *Guadalupe*.

Simply put, the 6-5 *en banc* majority decision places the decision in the hands of the federal courts instead of the people. "Courts will routinely make judgments traditionally reserved for the legislature and the people themselves." 69 F.3d 920, 962 (9th Cir. 1995)(Kozinski, J., dissenting).[1] This interference with traditional state prerogatives conflicts with decisions of this Court on an exceedingly important issue and should be reviewed.

The Tenth Amendment protects a State's traditional decisions from federal intrusion. The protection of State sovereignty ultimately protects the **individual**. *New York v. United States*, 505 U.S. at 181. "[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id., quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The proper scope of the Tenth Amendment is an important Federal issue, and the 6-5 *en banc* majority's decision pitting First Amendment rights against the Tenth Amendment rights of the State should be reviewed.

1 Nor is Article XXVIII the only part of Arizona's laws at risk under this case. As part of Arizona's Enabling Act, Congress required that Arizona's public schools "shall always be conducted in English" and that Arizona legislators be capable of communicating in English without an interpreter. Act of June 20, 1910, c. 310, 36 Stat. 557, 568-79; ARIZ. CONST., Art. XX, §§ 7, 8. Similarly, Arizona's bilingual education statute provides that the goal of transitional bilingual education is to teach children English so they can transfer to classes taught exclusively in English. A.R.S. § 15-754. Arizona can now expect First Amendment challenges to those traditional policies.



## CONCLUSION

Amici respectfully urge this Court to grant the petition.

Greg Jernigan
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55

Supreme Court, U.S.
FILED
MAY 8 1996
CLERK

No. 95-974

In The
# Supreme Court of the United States
October Term 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

# JOINT APPENDIX

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Petition for Certiorari Filed December 20, 1995
Certiorari Granted March 25, 1996

216 PP

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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**
**(Phoenix)**

**DOCKET**

Proceedings include all events.
TERMED
2:88cv1854 Yniguez, et al v. State of Arizona, et al
TERMED

U.S. District Court
U.S. District Court for the District of Arizona (Phoenix)

CIVIL DOCKET FOR CASE #: 88-CV-1854

Yniguez, et al v. State of Arizona, et al
Filed: 11/10/88
Assigned to: Judge Paul G. Rosenblatt
Demand: $0,000 Nature of Suit: 440
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in ◆0 : is :92- -17087
Dkt # in 9CCA : is 90-15581

Cause: 42:1983 Civil Rights Act

| | | |
|---|---|---|
| 11/10/88 | 1 | Civil Rights and Injunctive and Declaratory Relief Complaint Filed. Summons issued. (Sd) [Entry date 11/15/88] |
| 11/22/88 | 6 | Motion by defendant State of Arizona to dismiss for lack of jurisdiction (sd) [Entry date 11/23/88] |

12/07/88 15 Motion by plaintiff for preliminary injunction and order to show cause. (Sd) [Entry date 12/08/88]

2/13/89 60 ORDER by Judge Paul G. Rosenblatt granting stipulation (#59), and that this case be advanced & consolidated w/the hrg on pltf's app for prel inj scheduled t/b heard 2/13/89. (cc: all counsel) (sd)

2/23/89 66 SECOND AMENDED COMPLAINT (adding pltf, Jaime P. Gutierrez). (sd) [Entry date 02/24/89]

4/27/89 -- M/E: (C/R Bill McNutt) #68 - motion to dismiss for lack of jurisdiction; #30 - motion to dismiss; #15 - motion for preliminary injunction and order to show cause: All mtns taken under advisement. (Sd) [Entry date 05/03/89]

2/06/90 76 MEMORANDUM AND ORDER: by Judge Paul G. Rosenblatt granting and den in part dfts motion to dismiss for lack of jurisdiction and mtn to dismiss. FO: denying motion for preliminary injunction and order to show cause. [see doc for details] (cc: all counsel) (ce)

2/06/90 77 JUDGMENT: by Judge Paul G. Rosenblatt: article 28 of Const of State of AZ is declared void ... (re: order [76-1] (cc: all counsel/jgmt drawer) (ce)

2/15/90 78 MOTION to intervene filed by Official English



Committee and Robert D. Park [78] (ce) [Entry date 02/16/90]

2/16/90 82 MOTION to amend or alter jgmt by defendant [82-1] (ce) [Entry date 02/21/90]

3/26/90 -- CLERK'S MINUTES Judge Inits: PGR Crt Rptr: B. McNutt denying motion by State of AZ ex rel Robert K. Corbin to intervene by [92] denying motion to amend or alter jgmt by defendant [82-1] denying motion to intervene filed by Official English Committee and Robert D. Park [78] finding the motion to supplement argument moot. (mi)

4/04/90 105 MEMORANDUM AND ORDER: by Judge Paul G. Rosenblatt denying motion to amend or alter jgmt by Corbin [82], denying motion by State of AZ ex rel Robert K. Corbin to intervene [92], denying motion to intervene filed by Official English Committee and Robert D. Park [78]. (cc: all counsel) (ce)

4/09/90 106 NOTICE OF APPEAL by Arizonans for Off., Robert D. Parks from District Court [105], [76] (cc: 9CCA/All Counsel) (TDO - movant). (ce) [Entry date 04/10/90] [Edit date 04/10/90]

4/09/90 109 NOTICE OF APPEAL by State of Arizona, Robert K. Corbin from District Court jgmt on 2/06/90 and frm order dtd 4/04/90 den dft Corbin's mtn to altr amd jgmt and from 4/04/90 order den State of AZ's mtn to intervene. [77-1], [105-1] (cc: 9CCA/All Counsel) (ce) [Entry

date 04/17/90]

4/20/90 112 NOTICE OF APPEAL by Jaime P. Gutierrez from District Court [77-1], [76-1] (cc: 9CCA/All Counsel) (ce) [Entry date 04/25/90]

8/20/91 118 CERTIFIED COPY OF JUDGMENT from 9CCA affirming in part and reversing in part the decision of the District Court re: [Appeal [112-1] [Appeal [106-1] [109-1] 9CCA Nos. 90-15546, 90-15581 (cc: all counsel) (jh)

11/05/92 -- Original Record Received from 9CCA re [112-1] 3 volumes orig file; (dl)

12/3/92 123 NOTICE OF APPEAL by intervenor Arizonans for Off., intervenor Robert D. Parks from District Court [77-1], [76-1] (cc: 9CCA/All Counsel) (dl) [Entry date 12/09/92]

12/15/92 124 NOTICE OF CROSS-APPEAL by pla Maria-Kelly F. Yniguez from District Court [77-1], [76-1] (cc: 9CCA/All Counsel) (dl) [Entry date 12/23/92] (Edit date 12/23/92]

3/16/93 127 ORDER by Judge Paul G. Rosenblatt granting pltfs' re-submitted motion for award of attorney's fees [120-1] is gr to extent that the pltfs are awarded $97,582.50 in attorneys' fees. (cc: all counsel) (ce) [Edit date 10/20/93]

4/08/93 128 NOTICE OF APPEAL by dft State of Arizona, dft Rose Mofford from District court [127-1] (cc: 9CCA/All Counsel) (dl) [Entry date



04/14/93]

11/2/95 130 CERTIFIED COPY OF 9CCA Mandate affirming in part and reversing in part and remanding the decision of the District Court [Appeal [128-1], [Appeal [124-1], and [Appeal [123-1] (cc: all counsel/PGR) (rew)

11/7/95 131 ORDER by Judge Paul G. Rosenblatt re: order on appeal [130-1]; pla Maria-Kelly Yniguez is awarded $1.00 in nominal damages terminating case (cc: all counsel/jdgmt drwr) (rew)

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**DOCKET**

GENERAL DOCKET FOR Ninth Circuit Court of Appeals

Court of Appeals Docket #: 90-15546
File: 4/26/90
Nsuit: 3440 Other civil rights (Fed)
Yniguez, et al v. State of Arizona
Appeal from: District of Arizona (Phoenix)

- - - Case type information:
1) civil
2) private
3)
- - - Lower court information
District: 0970-2 : CV-88-1854-PGR
court reporter: Jean M. Moll
court reporter: Roberta Hightower
court reporter: William A. McNutt
presiding judge: Paul G. Rosenblatt, District Judge
Date Filed: 11/10/88
Date Order/Judgment: 4/03/90
Date NOA Filed: 4/09/90

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Fee status: paid

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Prior cases:
None
Current cases:



| Lead | Member | Start | End |
|---|---|---|---|
| consolidated: | | | |
| 90-15546 | 90-15581 | 4/27/90 | |

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - Panel Assignment:
Panel: TT BBF SR 3 : PAS 12/14/90 pm
Date of decision: **/**/**

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Proceedings include all events.
90-15546 Yniguez, et al v. State of Arizona

4/26/90 1 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. Setting schedule as follows: CADS due 5/10/90 for James F. Henderson; appellant's designation of RT is due 4/19/90; appellee's designation of RT is due 4/30/90; appellant shall order transcript by 5/09/90; court reporter shall fine transcript in DC by 6/11/90,,, ; certificate of record shall be filed by 6/18/90 ; appellant's opening brief is due 7/26/90; appellees' brief is due 8/27/90; appellants' reply brief is due 9/10/90; [90-15546] (mt) [90-15546]

5/09/90 7 Filed Appellants Robert D. Parks & Arizonans' motion to expedite appeal. [90-15546, 90-15581] served on 5/07/90 [1760241] (CONFAT) [90-15546, 90-15581] (dg) [90-15546 90-15581]

5/24/90 9 Filed order CONFATT (BLS) Case selected for Pre-Briefing Conference program. A pre-

briefing conference will be held on 6/20/90 at 10:30 a.m. pacific time. The time schedule order remains in effect. [90-15546, 90-15581] (dg) [90-15546 90-15581]

5/30/90 11 Filed order CONFATT (CLB) Appellant's motion for the expedited consideration of its appeal is denied. Subject to reconsideration if any objection filed within 10 days. [1760241-1] [90-15546] (sm) [90-15546]

7/06/90 16 Filed order CONFATT (CLB) These appeals are consolidated. Per the discussions held at the conference, the issues to be raised in these appeals are: a) whether the district court's denial of appellants' post-judgment motions to intervene was proper; b) whether the Arizona appellants, as defendants dismissed from the action on their own motion, retain sufficient interest in the case to permit them to appeal the court's judgment. The briefing schedules previously set by the courts orders of 4/26/90 and 4/27/90 are vacated. The following briefing schedule shall govern these appeals: a) Appellants Arizonans for Official English Committee and Robert D. Park shall file an opening brief of not more than 30 pages on or before 7/26/90. b) Appellants State of Arizona and Robert Corbin shall file an opening brief of not more than 40 pages on or before 7/26/90. c) Appellants shall file a joint excerpts of record on or before 7/26/90. d) Appellees shall file one answering brief of not more than 60 pages on or before 9/11/90. e) Appellants in each of



these appeals may file a reply brief of not more than 15 pages on or before 9/25/90. (4) The clerk shall set these appeals for oral argument as soon as possible. (5) Because appellants in No. 90-15546 agree to the establishment of the briefing schedule outlined above, their motion for reconsideration of the denial of their motion to expedite is moot. Accordingly, appellants Arizonans for Official English agree to the withdrawal of their motion. (6) The clerk shall docket as attorney of record for appellees in both appeals: Robert J. Pohlman, Pohlman & Sanders, 2525 East Arizona Biltmore Circle, Suite 220, Phoenix, AZ 85016, (602) 224-0100. (7) The clerk shall docket as attorney of record for appellants Arizonans for Official English & Robert D. Parks: Barnaby W. Zall, Williams & Jensen, P.C., 1101 Connecticut Avenue, N.W., 5th Floor, Washington, DC 20036, (202) 659-8201. Subject to reconsideration if any objection filed within 10 days., [90-15546, 90-15581] (sm) [90-15546 90-15581]

12/14/90 36 ARGUED AND SUBMITTED TO: TANG, FLETCHER, REINHARDT [90-15546, 90-15581] (jc) [90-15546 90-15581]

7/19/91 40 FILED OPINION: AFFIRMED IN PART, REVERSED IN PART (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. TANG; FLETCHER; REINHARDT, author.) FILED AND

ENTERED JUDGMENT. We shall retain jurisdiction over the appeal of the dc's decision on the merits. [90-15546, 90-15581] (ck) [90-15546 90-15581]

8/05/91 45 Received James F. Henderson for Appellant Robert D. Parks, Appellant Arizonans letter dated 7/31/91 re: clarification of court's intention, re: 7/19/91 opinion (PANEL) [90-15546, 90-15581] (sm) [90-15546 90-15581]

8/14/91 47 MANDATE ISSUED [90-15546, 90-15581] (sm) [90-15546 90-15581]

9/16/91 51 Filed Appellee Maria-Kelly F. Yniguez' document entitled "Suggestion of Mootness", served on 9/12/91 (PANEL) [90-15546, 90-15581] (sm) [90-15546 90-15581]

9/20/91 49 Filed Appellant Robert D. Parks' motion to recall the mandate, served on 9/18/91 [2000490] (AUTHORING JUDGE) [90-15546, 90-15581] (sm) [90-15546 90-15581]

7/13/92 60 RECORD RETURNED. (See control card for details.) (ft) [89-55946 89-56146 89-56214 90-10146 90-15546 90-15581]

9/16/92 62 Filed per curiam opinion (Judges Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT): rejecting the state's suggestion of mootness. (Rejecting Park's motion to recall mandate) [2000490-1] [90-15546, 90-15581] (dl) [90-15546 90-15581]



**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**DOCKET**

GENERAL DOCKET FOR Ninth Circuit Court of Appeals

Court of Appeals Docket #: 92-17087
Filed: 12/18/92
Nsuit: 3440 Other civil rights (Fed)
Yniguez, et al v. State of AZ, et al
Appeal from: District of Arizona (Phoenix)
- - - Case type information:
1) civil
2) private
3)
-- - Lower court information:
District: 0970-2 : CV-88-01854-PGR
court reporter: Jean M. Moll
court reporter: William A. McNutt
presiding judge: Paul G. Rosenblatt, District Judge
Date Filed: 11/10/88
Date order/judgment: 2/06/90
Date NOA filed: 12/03/92
- - - Fee status: paid
- - - Prior cases:
90-15546 TT BBF SR
Date filed: 4/26/90 Date disposed: 7/19/91
Disposition: af.rv/opn 90-15581 TT BBF R
Date filed: 4/27/90 Date disposed: 7/19/91
Disposition: af.rv/opn
Current cases:
Lead Member Start End
consolidated:

92-17087 93-15719 4/22/93
cross appeal:
92-17087 93-15061 1/15/93

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Panel Assignment:
Panel: BBF SR DFO : **/**/**
Date of decision: **/**/**
Panel: SR CHH CEW 1 : SF 7/20/95 am
Date of decision: **/**/**
Panel: TT BBF SR 2 : PAS 5/03/94 pm
Date of decision: **/**/**
Panel: AKJ MDH null 1 : SF 7/20/95 am
Date of decision: **/**/**
Panel: MB AK FFF 1 : SF 7/20/95 am
Date of decision: **/**/**
Panel: JCW PRH HP 1 : SF 7/20/95 am
Date of decision: **/**/**

Docket as of April 4, 1996 6:27 am

Proceedings include all events.
92-17087 Yniguez, et al v. State of AZ, et al

12/18/92 1 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. Setting schedule as follows: CADS due 1/04/93; appellant's designation of RT is due 12/14/92; appellee's designation of RT is due 12/23/92; appellant shall order transcript by 1/04/93; court reporter shall file transcript in DC by 2/02/93; certificate of record shall be filed by 2/09/93; appellant's opening brief is due 3/22/93; appellees' brief is due 4/20/93; appellants' reply brief is due



5/04/93; [92-17087] (wd) [92-17087]

2/08/93 7 Filed Arizonans Against Constitutional Tampering's motion to become amicus curiae, served on 2/05/93 [PROMO] [92-17087, 93-15061] (ot) [92-17087 93-15061]

2/10/93 6 Case released from Pre-Briefing Conference program. (jr) [92-17087 92-17103 92-17108 92-17116 92-17119]

4/12/94 51 Filed order (Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT): The Motion For Leave To File An Amicus Curiae Brief, filed by Arizonans Against Constitutional Tampering ("ACCT") is granted. The brief shall be no more than 30 pgs in length, and shall be filed on or before Apr 28, 1994. In addition to filing the regular nbr of copies of its brief with the Clerk of the Court and serving the parties in normal course, amicus ACCT shall arrange for the receipt, on or before the filing date, of a copy of its brief by each member of the panel in his or her respective chambers. (all csl adv) in 92-17087, 93-15061 [92-17087. 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

5/02/94 53 Filed Amicus Arizonans Against Constitutional Tampering's Motion to Participate in Oral Argument, served on 5/02/94 (FAXED/PAS to Lucy, to be distributed to panel) (ot) [92-17087 93-15061 93-15719]

5/03/94 55 ARGUED AND SUBMITTED TO Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT [92-17087, 93-15061, 93-15719] (lu) [92-17087 93-15061 93-15719]

5/26/94 57 Filed Amicus Arizonans Against Constitutional Tampering and Thomas Espinoza's motion to intervene as plaintiffs-aples, served on 5/25/94 [PANEL] (ot) [92-17087 93-15061 93-15719]

6/21/94 64 Filed order (Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT): the motion to Intervene as Plaintiffs-Appellees, submitted by ACCT and Thomas Espinoza, as ACCT Chairperson, is granted. [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

12/07/94 72 FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Thomas TANG; Betty B. FLETCHER; Stephen R. REINHARDT, author.) FILED AND ENTERED JUDGMENT. [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

12/20/94 73 Filed original and 40 copies Aplts/X-Aples Arizonans For Official English and Robert D. Park's petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 12/19/94 (PANEL & ACTIVE JUDGES) (ot)



[92-17087 93-15061 93-15719]

12/21/94 74 Filed original 03 copies State of AZ motion to modify opinion, served on 12/20/94 (PANEL) [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

12/29/94 80 Filed Appellant/Cross-Aples Arizonans for Official English and Robert D. Park's response, opposing State of Arizona cross-appeal motion to modify the opinion, etc., served 12/28/94 PANEL [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

1/12/95 82 Filed order (Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT): The motion for leave to file an amicus curiae brief in support of the P/R & Suggestion for Rehearing En Banc, filed by the U.S. English, is granted. In addition, the parties are directed to file written responses to both Intv-Def/Aplts Arizonans for Official English's P/R & Suggestion For Rhrg En Banc and the amicus brief of U.S. English. The written responses are to be no more than 15 pgs in length and shall be filed w/in 21 days of the date of this order. 40 copies of the written response shall be filed. [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

1/17/95 83 Filed order and amended opinion (Judges Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT, author. Opinion id: [The opinion filed Dec 7, 1994 is amended as

follows: See Casefile for amendments] AFFIRMED IN PART, REVERSED IN PART, AND REMANDED [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

1/23/95 85 Filed order (Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT): Interv/Def-Aplts-cross-appeal opposition to State of AZ's motion to modify opinion filed Dec 29, 1994, was not rcv by the pnl until after the order amending the opinion was submitted by the Clk for filing. Accordingly, the Atty Genl is now directed to submit a ltr-brf of not more than 12 pgs responding to the opposition. The ltr-brf shall be filed w/in 21 days of the date of this order ..... response shall address the genl question of Az Atty Genl's and shall be filed with the Clk and served on all csl. Copies shall be mailed to the chambers of the three jdgs whose names appear on this order. (For complete text of order see casefile) [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

1/24/95 86 Received Barnaby W. Zall for Amicus Robert Corbin, Appellant /x-Aple Arizonans letter 1/23/95 re: the petition for rehearing and the suggestion for rehearing en banc submitted on Dec 16, 1994 and if a new P/R shld be filed based on the amd opn, served 1/23/95 PANEL [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

5/12/95 103 Filed order (J. C. WALLACE,): Upon the vote



of a majority of nonrecused regular active judges of this crt, it is ordered that this case be reheard by the en banc crt pursuant to Cir R 35-3. in 93-15719, 92-17087, 93-15719 [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

6/02/95 112 Filed order (NO FOR PUBLICATION) (J. C. WALLACE): Within twenty-one (21) days of the filing of this order, the parties are requested to file simultaneously with this court ..... Each brief shall to the format of Ninth Circuit Court of Appeals and be no more than twenty-five (25) pages in length. (for complete text see casefile) (PHONED at 3:45 pm PT.) [92-17087, 93-15061, 93-15719] (rei) [92-17087 93-15061 93-15719]

7/20/95 145 ARGUED AND SUBMITTED TO J. C. WALLACE, Procter R. HUG, Harry PREGERSON, Stephen R. REINHARDT, Cynthia H. HALL, Charles E. WIGGINS, Melvin BRUNETTI, Alex KOZINSKI, Ferdinand F. FERNANDEZ, Andrew J. KLEINFELD, Michael D. HAWKINS [92-17087, 93-15061, 93-15719] (eu) [92-17087 93-15061 93-15719]

10/5/95 148 FILED OPINION IN TWO VOLUMES: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Heard en banc; J. C. Wallace, concurrence to

dissent; Procter R. Hug; Harry PREGERSON; Stephen R. REINHARDT, author and Special Concurrence; Cynthia H. HALL; Charles E. WIGGINS; Melvin BRUNETTI, concurring; Alex KOZINSKI, dissenting; Ferdinand F. FERNANDEZ, dissenting; Andrew J. KLEINFELD; Michael D. HAWKINS) AND ENTERED JUDGMENT. [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

10/27/95 151 MANDATE ISSUED [92-17087, 93-15061, 93-15719] (jr) [92-17087 93-15061 93-15719]

12/8/95 160 File order (J. C. WALLACE, Harry PREGERSON, Stephen R. REINHARDT, Cynthia H. HALL, Charles E. WIGGINS, Melvin BRUNETTI, Alex KOZINSKI, Ferdinand F. FERNANDEZ, Andrew J. KLEINFELD, Michael D. HAWKINS,): A majority of the en banc court has voted to refer the application of award of atty. fees to the three-judge panel. [92-17087, 93-15061, 93-15719] (em) [92-17087 93-15061 93-15719]

12/27/95 161 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 95-974 filed on 12/21/95. [92-17087, 93-15061] (crw) [92-17087 93-15061]

1/10/96 162 Filed order (Deputy Clerk: CAC/CLERK) In light of the en banc court's referral of the application of award of attorney fees to the three-judge panel, Judge O'Scannlain has been



drawn to replace Judge Tang on the panel. The panel now consists of Judges Fletcher, Reinhardt and O'Scannlain. [92-17087, 93-15719] (vt) [92-17087 93-15719]

3/29/96 164 Received notice from Supreme Court, petition for certiorari GRANTED on 3/25/96. Supreme Court No. 95-974 (ah) [92-17087 93-15061 93-15719]

**STATE OF ARIZONA**
**LOYALTY OATH**

I, the undersigned, hereby execute this document in compliance with Chapter 108 (House Bill 115) Laws 1961, First Regular Session.

Sec. 38-231, Arizona Revised Statutes:

38-231. OFFICERS AND EMPLOYEES REQUIRED TO TAKE LOYALTY OATH; FORM: PENALTY

A. In order to insure the statewide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political subdivisions, and of any county, city, town, municipal corporation, school district, and public educational institution, shall immediately upon the effective date of this act completely reproduce Section 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and employees of all boards, commissions, agencies and independent offices.

B. For the purposes of this section, the term officer or employee means any person elected, appointed, or employed, either on a part-time or full-time basis, by the state, or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

C. Any officer or employee elected, appointed, or employed prior to the effective date of this act shall not later than ninety days after the effective date of this act take and subscribe the form of oath or affirmation set forth in this section.

D. Any officer or employee within the meaning of this section who fails to take and subscribe the oath or



affirmation provided by this section within the time limits prescribed by this section shall not be entitled to any compensation unless and until such officer or employee does so take and subscribe to the form of oath or affirmation set forth in this section.

F. Any of the persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended, related to the employment of aliens, shall be exempted from any compliance with the provisions of this section.

G. In addition to any other form of oath or affirmation specifically provided by law for an officer or employee, before any officer or employee enters upon the duties of his office or employment, he shall take and subscribe the following oath or affirmation:

STATE OF ARIZONA )
) SS #527-92-4228
COUNTY OF Maricopa )

I, Maria Kelly F. Yniguez do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; That I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of Department of Administration according to the best of my ability, so help me God (or, so I do affirm).

Maria-Kelly Yniguez

**1988 GENERAL ELECTION PUBLICITY PAMPHLET**

# ARIZONA
# PUBLICITY PAMPHLET

**"THE CHOICE IS YOURS"**

Propositions to be submitted to the qualified electors of the State of Arizona at the

GENERAL ELECTION
NOVEMBER 8, 1988

COMPILED AND ISSUED BY
**JIM SHUMWAY**
**SECRETARY OF STATE**

Filed 7/15/88
4:58 p.m.

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[25]

## PROPOSITION 106

OFFICIAL TITLE

**AN INITIATIVE MEASURE**

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA RELATING TO THE ENGLISH LANGUAGE PROVIDING THAT ENGLISH IS THE OFFICIAL



LANGUAGE OF THE STATE OF ARIZONA, AND AMENDING THE CONSTITUTION OF ARIZONA BY ADDING ARTICLE XXVIII.

TEXT OF PROPOSED AMENDMENT

Be it enacted by the People of the State of Arizona.

The following amendment to the Constitution of Arizona, by adding Article XXVIII, is proposed to become valid when approved by a majority of the qualified electors voting thereon and on proclamation of the governor.

Section 1. The Constitution of Arizona is amended by adding Article XXVIII, to read:

**ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE**

*1. English as the Official Language; Applicability.*

Section 1.(1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3)(a) This Article applies to:

(i) the legislative, executive and judicial branches of government.

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,

(iii) all statutes, ordinances, rules, orders,

programs and policies.

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

*2. Requiring This State to Preserve, Protect and Enhance English.*

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

*3. Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.*

Section 3.(1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary



to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

[26]

(c) to teach a student a foreign language as a part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

*4. Enforcement; Standing.*

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

**ANALYSIS BY LEGISLATIVE COUNCIL**
(In compliance with A.R.S. section 19-124)

Proposition 106 would amend the Constitution of Arizona by adding article XXVIII to make English the official language of this state and all political subdivisions of this state, including every city and county. The Proposition would require this state and all cities and counties to act in English and no other language. To be valid, all governmental documents would have to be written in the English language only. The Proposition would allow the state and its political subdivisions to act in a language other than English when necessary to comply with federal laws, to teach a student a foreign language, to protect the public health and safety and to

protect the rights of criminal defendants or victims of crime. Proposition 106 also would allow a person who resides or does business in Arizona to enforce this new constitutional requirement in court.

**LEGISLATIVE COUNCIL ARGUMENTS FAVORING PROPOSITION 106**

The State of Arizona is at a crossroads. It can move toward the fears and tensions of language rivalries and ethnic distrust, or it can reverse this trend and strengthen our common bond, the English language.

Immigrants from all over the world have been able to share their cultural heritages with other Americans because our citizens have shared a common language. With one shared language we have learned to respect other people and other cultures with sympathy and understanding.

But today, language conflicts and ethnic separatism threaten to erode our common bond. If this erosion continues, it will result in irreparable damage to the fragile unity that our common language has helped us preserve for over two hundred years. This amendment will stop this erosion by requiring this state as well as all cities and counties to function only in English, except where public health, safety and justice require the use of other languages. Our state and local governments would also protect English by issuing voting ballots and materials only in English, except when required to do otherwise by federal law.

This constitutional amendment sends a clear and simple message -- English is the official language of Arizona. To function and participate in our society, every resident must know English. When people are not encouraged to learn English as quickly as possible, they don't have the same opportunities as others who are skilled in English and they are kept out of the mainstream of American politics, society and



economy. English is the language of opportunity, of government and of unity.

**LEGISLATIVE COUNCIL ARGUMENTS OPPOSING PROPOSITION 106**

This Proposition, despite its title, will not preserve English as our common language. Instead, it will undermine the efforts of new citizens of our state to contribute to and enter the mainstream of American society.

While claiming to be a way of promoting unity, this Proposition will actually foster disunity among our citizens where none now exists. It threatens to divide Arizona and tarnish our proud heritage of unity and tolerance.
[27]

This Proposition is completely unnecessary. English is now and will remain the language of Arizona. Ninety-eight percent of Americans are fluent in English. And the remaining two percent already have economic reasons to learn English that are far more effective than any ballot proposition can ever hope to be.

The promoters of this Proposition have not thought out its consequences. It is not clear what the state or a local government could or could not do. For example, it could outlaw essential multilingual public service information such as pamphlets informing non-English speaking parents how to enroll their children in school. It could also allow the elimination of court interpreters for witnesses, crime victims and defendants. Street signs with foreign names could be outlawed. The uncertain requirements of this Proposition would invite costly, decisive and endless legal battles. And in the end the only winners would be the lawyers.

This Proposition will not help or prompt anyone to learn English. It will not improve human relations. It will not lead to a better state. Instead it will lead to tension and costly

litigation. It is unnecessary, counterproductive and, in the most fundamental sense, un-American.

**ARGUMENT "FOR" PROPOSITION 106**

Proposition 106, the proposed constitutional amendment to designate English the official language of Arizona requires that government conduct its business in English. "As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions," reads the initiative.

A similar initiative to designate English the official-language was passed in California in 1986. 73 percent voted in favor of that initiative.

Further, besides California, 13 other states have already declared English to be their official language.

Proposition 106 has three basic purposes:

1. Designate English the official language of Arizona;
2. Require the government to function in English, except in certain circumstances; and
3. Require the government to preserve and protect the English language.

Under Proposition 106, government may use languages other than English to:

- Protect the health and safety of citizens,
- Teach foreign languages in schools,
- Protect the rights of crime victims and those accused of committing crimes,
- Comply with federal law, and,
- Teach English to non-English speaking citizens.

Officially sanctioned multilingualism causes tension and division within a state. Proposition 106 will avoid that fate in Arizona, while promoting a more efficient and cost-effective government.



Additionally, passage of Proposition 106 would encourage non-English speakers to familiarize themselves with the language, opening up economic and social opportunities to all Arizonans.

By mandating that government preserve the English language, Proposition 106 ensures that Arizonans will share the common bond of language for generations to come.

The time is now to declare in law what we assume to be fact:

English is our official language

Vote YES on Proposition 106.

Robert D. Park
Chairman,
Arizonans for Official English

[28]

**ARGUMENT "FOR" PROPOSITION 106**

Proposition 106 is a proposed Constitutional Amendment that would make English the official language of Arizona. If passed, English will become the primary language of government. Our everyday lives will not generally be affected. Various languages will continue to be taught in schools, and language among friends and in the private workplace will not be altered in any way.

Ours is an age when governments and educators in almost every country in the world encourage children to learn English, a language recognized as the language of international business and air travel as well as that of unity and prosperity.

The motto of our nation, "E Pluribus Unum", "Out of Many, One", is the enduring theme and strength of America. Today, due to a trend toward official multilingualism, our great unifying force – the use of the English language – is eroding,

and our nation is becoming a people separated by, instead of unified by, language.

The federal government complies with, even perpetuates this lack of unity by requiring states to print bilingual ballots whose extra costs of 10 to 20 percent are then passed on to all citizens.

In addition, the efforts of misguided leaders to promote multilingualism have hurt the persons they are trying to help by delaying their entry into the economic, political and social mainstream of America.

Fourteen states, including California, have already taken action to reinstate the common bond of language in their citizenry by passing measures making English the official language.

As a voter, you have been given an opportunity to create a characteristic to be shared by all Arizonans – making English the official language. We urge you to utilize this opportunity to promote unity in our nation. Support Proposition 106 by voting YES on November 8.

Carl J. Kunasek
President
Arizona Senate

Dave Carson
Representative
District 1

**ARGUMENT "FOR" PROPOSITION 106**

The United States is truly a nation of immigrants, who have been drawn to America as a beacon of freedom and opportunity. Because of our diverse background, we share no common bond of race, ethnicity or religion. One bond we do share, however, is the bond of a common language – English.

Throughout our history, immigrants have sought to learn English not only to benefit from the economic opportunities made available as a result of that knowledge, but also to mark their entry into the mainstream of American society.



In recent decades, both the federal and state governments have drifted away from this historic emphasis on English by using other languages for a host of nonessential services. This departure from our historic language policy will have far-reaching effects on the future of American society.

We believe that a policy of a single common language has served our nation well and it avoids the chaos and cost of official multilingualism.

If Arizona voters approve the amendment to make English the official state language they will be signaling the will of the people to maintain our common bond of language and will be directing the state government to halt the drift towards official multilingualism or bilingualism.

Unless we become serious about protecting our heritage as a society of various cultures bound by a common language, we may lose a precious resource that has helped us forge a single people from so many diverse elements. Making English the official language of government will protect the future successful integration of new Americans, as it has helped make Americans out of so many immigrants in the past.

Vote YES on Proposition 106 on November 8.

Linda Chavez
President
U.S. English

[29]

**ARGUMENT "FOR" PROPOSITION 106**

If the United States is to remain a great nation of which we can all be proud, we must have only one official language. We can enjoy many different traditions, cultures, races and languages. However, we must have only one official language for governmental purposes. Without the unifying force of one official language, divisiveness and conflicts are certain to

develop.

All patriotic citizens in Arizona will be making a significant contribution toward maintaining our country as a leader in the world of nations when they vote YES on Proposition 106 as an amendment to our state Constitution.

When Arizona citizens cast a YES vote on Proposition 106 it will NOT be denying any non-English speaking person the right to have: 1) an interpreter in an election booth, or, 2) an interpreter in any police action or criminal court of law.

Passage of Proposition 106 will not eliminate bilingual ballots in any official state, county or local elections where required by federal law.

Passage of Proposition 106 will in no way eliminate or discourage the study of foreign languages in our schools. Neither will it disallow the use of any language in conversations in homes, churches or among friends in the private workplace.

Passage of Proposition 106 will permit the continued promotion of bilingual education on all levels of learning in our state where required by federal law.

Passage of Proposition 106 will not eliminate bilingual public notices for the health and safety of our citizens.

The main reason for Proposition 106 is to guarantee that official governmental business, including documents drawn at the state level, as well as business and those documents drawn for all political subdivisions such as counties, cities and town, shall be valid, effective and enforceable only if conducted and written in the English language.

W. P. Shofstall, Ph.D.
Professor Emeritus, ASU
Former Superintendent of
Public Instruction, Arizona

Wayne A. Forde, MA in Ed.
Retired Assistant Principal
Phoenix Union High Schools



Lewis A. Tambs, Ph.D.
Professor of History, ASU
Former U.S. Ambassador,
Columbia and Costa Rica

**ARGUMENT "AGAINST" PROPOSITION 106**

Every foreign born citizen came to America because here, they have freedom of choice. They became American citizens by choice.

I cannot understand how any American citizen would want English to be our official language after knowing that our forefathers won a revolution 200 years ago to rid this country of English rule.

The only reason we are still using English based law is because of the compromise made to the self-serving English Bankers when making the constitution.

People in Australia speak English because they are subjects of England. Americans are not subjects of England, therefore, our official Language should not reflect a country other than AMERICAN.

In almost every country in the world the language reflects the name of their country. Why should America be different?

People in Russia speak Russian, people in Germany speak German, people in Italy speak Italian, people in Japan speak Japanese, people in Spain speak Spanish, people in France speak French, people in Poland speak Polish, people in England speak English and American speak American even if it is derived from English.
[30]

Even the English refer to our language as American shown in the glossary printed in England for use in foreign auto repair books.

American should be designated the official language of the United States of America, just as the Webster dictionary shows on it's cover.

If you feel "American" should be designated our official language you have the right to vote no to English and write in Proposition number 106 and the word AMERICAN in the space provided on your write-in envelope.

Buck Burdette, Pres.
Quartzsite School Board
Quartzsite, Arizona

**ARGUMENT "AGAINST" PROPOSITION 106**

Arizona has had a long tradition of embracing the Hispanic and Native American cultures. We see those cultural influences in our art and architecture, our food, our festivals and even our language. The names of our mountains and our rivers, our cities and our streets bear testimony to the pervasive influence that the Hispanic and Native American languages have had on our state.

Despite these influences, there has been no attempt to conduct the State's business in other language. The governing language of this state has been, and will continue to be, English. Those from other countries and cultures try to learn English as quickly as possible. Immigrants are flooding our English-language classes. Everyone agrees that proficiency in the English language is essential for personal and financial success in this state. Proposition 106 will not help one person to learn a single word of English.

Proposition 106 does more than simply maintain the status quo, however. The constitutional amendment raises a number of questions. Will lawyers no longer be able to use the Latin phrases "habeas corpus" and "subpoena"? Will deaf people be prevented from having a sign language interpreter



at city council meetings? Will a city employee be prohibited from explaining a water bill charge to someone who speaks only Spanish? The answers to these types of questions will be determined by the courts through expensive taxpayer-financed lawsuits.

Proposition 106 is offensive to Hispanics and Native Americans because it implies that they are not trying hard enough to learn the English language. But it is also offensive to all other Arizonans. We don't need a law that in any way discourages contributions from those cultures that have so enriched our state.

I urge you to vote no on Proposition 106.

Senator Jaime Gutierrez

**ARGUMENT "AGAINST" PROPOSITION 106**

Arizona is made up of people from many nations, many cultures, many languages. We are proud to have more Native American communities than any other state, that settlers come here from Spain and Mexico, the rest of Europe, Asia and Africa.

The very name of our State, Arizona, comes from another language.

Now, an organization based in Washington, D.C., proposes that we amend the Arizona Constitution to enact an "English-only" proposal.

What terrible problem does this radical action seek to solve? I can think of none. What problems will "English only" cause if adopted? I can think of many.

There is no question but that residents of Arizona should be proficient in English to fully participate in daily life. However, this measure does not create better ways of teaching English or to help improve communication skills. Instead, it makes it a crime for any government official or

employee to conduct business in a language other than English. It also allows any Arizona resident or person doing business in Arizona to file a lawsuit to enforce the language ban. Harassing lawsuits will create an additional financial burden for Arizona taxpayers.
[31]

Other languages can be used only in the few situations involving public "health and safety". The limited exception does not seem to allow a police officer or bus driver to give directions to a non-English speaking tourist. Government agencies cannot conduct business with foreign trade delegations interested in buying Arizona products in their own language.

Today, the success of Arizona's economy and the future prosperity of our children is increasingly dependent upon our ability and willingness to compete in the global market place. If Arizona adopts "English only" it will send a negative message to our potential trade partners. We cannot afford to shrink our economic opportunities.

Terry Goddard
Mayor, City of Phoenix

**ARGUMENT "AGAINST" PROPOSITION 106**

The English Only movement has arrived in Arizona with the intent of changing our constitution to declare English the official language. It sounds reasonable, but Arizona's teachers have reviewed this proposition carefully and found that there is more here than meets the eye. The English Only movement, financed primarily by out-of-state funds, poses a threat to school children and public education itself.

Practically speaking, English is already the official language of Arizona and the United States. A review of the



English Only movement reveals a national campaign that uses language to discriminate against Americans of diverse ethnic backgrounds. Such reactionary views recall some unfortunate periods in American history: the Jim Crow laws of the 1870's, the Chinese Exclusion Act of 1882, the anti-German, English-only Nebraska Act, which was a repercussion of World War I.

These discriminatory laws were the result of perceived conspiracies. Groundless fear of ethnic conspiracy is exactly what the English Only movement in Arizona represents today.

Two out-of-state organizations are behind this movement and have contributed heavily to the Arizona campaign: English First and U.S. English. The President of English First is an officer of another organization which issued a report that implies that Hispanics are a national security risk. We cannot afford passage of this proposition, repeating previous, reactionary blunders.

Instead, it is time we learned from history. English is not in danger; we can't allow alarmists to spread the fear that it is. Such fear discourages the teaching of other languages at a time when multi-lingual communications skills are critical to our Nation's economic and political success worldwide.

Vote no on English Only.

Darrell Guy, President
Arizona Education Association

**ARGUMENT "AGAINST" PROPOSITION 106**

Vote no on "English Only" Initiative.

Vote no on the "English Only" initiative if you believe that freedom and justice belongs to all Americans regardless of their language.

Vote no on the "English Only" initiative if you believe that the basic inalienable constitutional rights of life, liberty and the pursuit of happiness belong to all Americans regardless of language.

The "English Only" initiative is veiled in an artificial cloak of patriotism. It is ill intentioned and would discriminate against some of our citizens by restricting basic government services and denying them administrative due process because of language.

Arizona LULAC
Ralph Romero
Director

[32]
**ARGUMENT "AGAINST" PROPOSITION 106**

We all agree that proficiency in English is important for anyone who wants to play a meaningful role in society. That is why I supported a proposal that would direct the Legislature to create programs to meet the goal of English literacy. However, the initiative to declare an English-only policy in Arizona is sadly misdirected.

Arizona is commercially a multi-lingual state. Each year, Arizona spends millions of dollars to attract visitors from around the world. A newspaper story earlier this year detailed how Arizona was in the top ten destinations for foreign visitors.

In addition, this state has devoted considerable efforts to encourage exports to other countries. These efforts include the establishment of an office in Taiwan.

Proposition 106, if adopted, could preclude our Departments of Commerce and Tourism from publishing brochures in any foreign language. This would put our state at a serious disadvantage with other states and countries



which recognize the importance of helping businessmen and tourists with pamphlets and documents available in other languages.

This proposition could also bar state employees from answering the most routine questions and providing help in many circumstances.

Many Arizonans object to the cost of printing ballots in both Spanish and English. However, Proposition 106 will not eliminate bilingual ballots, which are mandated by federal law.

Passage of an English only amendment would cause more problems for Arizona than it would solve. I strongly urge that you defeat the measure.

Rose Mofford
Governor

**ARGUMENT "AGAINST" PROPOSITION 106**

Proposition 106 is a lie.

- It is a lie because it plays on the dislike of the bilingual ballots. But the measure would not affect such ballots, which are controlled by federal law.
- It is a lie because it pretends to protect bilingual education programs designed to teach English to youngsters. But that protection dissolves if such programs are no longer mandated by the federal government.
- It is a lie because it pretends to be a home-grown effort. But virtually every dollar to put the measure on the Arizona ballot came from an organization based on the East Coast. And petition circulators had to be paid to work on the project.
- It is a lie because backers say it is just like the one adopted by California voters two years ago. But the

language of the Arizona measure is far broader and has many more prohibitions against the use of other languages.

- And, finally, it is a lie because it pretends that it will cause more people to learn English. Yet it contains absolutely nothing to provide that education.

The key to English proficiency is education for youngsters raised in non-English speaking households and for adults who have never mastered the language. Prohibiting government workers from communicating in any language other than English simply excludes these people from participation in society.

The measure is divisive. It should be relegated to the scrap heap of bad ideas.

State Rep. Armando Ruiz
Chairman, Arizonans Against Constitutional Tampering

[33]

**ARGUMENT "AGAINST" PROPOSITION 106**

We are a nation of immigrants.

Either we or our ancestors – excluding Native Americans – came from many countries. We all came for different reasons, but every one of us looked upon this nation as a place of freedom and opportunity.

This diversity brought strength to this nation. It brought generosity, kindness and a spirit of tolerance. We accept many new things and we grow with our open minds.

Now, some would have us close our minds.

Proposition 106 is the most restrictive and punitive English only measure to be proposed in any state. It goes far beyond what was enacted in California. It is stricter than a measure that is before Colorado voters this year.

It would result not only in discrimination against



Arizonans but also would encourage litigation against government officials and employees. It would mandate that all government agencies act in English only and that no other language may be used, with only a few exceptions, such as in protecting the rights of criminal defendants or victims of crime.

That means a government official, employee or agent of the state who may violate this provision – no matter what the reason – could be sued by an Arizona resident or anyone doing business in this state.

Creating more litigation is not the answer for Arizona.

I see the efforts to enact English only legislation as efforts to close the door to our tolerance and generosity. I see these efforts as barriers to our ability to change and grow. In short, I see these efforts as a sign of hard-heartedness in this country.

Proposition 106 is a bad idea and should be defeated.

Morris K. Udall, U.S. Representative

**ARGUMENT "AGAINST" PROPOSITION 106**

Arizonans are very concerned about current proposed amendments regarding the use of language. Primarily, the Official English amendment. We urge public officials and the community at large to oppose any action intended to mandate or declare English as the only language. Such actions are unnecessary, unconstitutional and un-American. English is already the recognized language of Arizona and the Nation. Relatively few people do not speak English.

The Official English amendment would outlaw the use of any language other than English in the conduct of government business. Only English will be allowed in public schools, state universities, city or state government offices.

negotiations with Mexico or South America. All non-criminal legal proceedings would have to be conducted in English only. No translators would be allowed either for witnesses or for the parties involved. Unable to get answers these groups would de facto have no rights.

Another set of potential victims of Official English are government employees. The Arizona version of Official English has a third party suit provision. That means that if someone overhears a language other than English being used by a government employee, that person can bring suit. Any resident or person doing business in Arizona can sue. Anyone who uses a foreign phrase or word even accidentally is in jeopardy!

The Official English amendment does not deal with learning English at all. It merely punishes people who do not speak English. The Official English representatives have refused to give their time or money to the literacy projects that are struggling to handle the huge demand for their services. There are thousands on waiting lists, desperate to learn English.

The amendment will cost money. It is expensive to regulate an area that has never been regulated.

Jesus "Chuy" Higuera
State Senator

[34]



## BALLOT FORMAT

**PROPOSITION 106**
**PROPOSED AMENDMENT TO THE CONSTITUTION BY THE INITIATIVE**

*OFFICIAL TITLE*

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA RELATING TO THE ENGLISH LANGUAGE; PROVIDING THAT ENGLISH IS THE OFFICIAL LANGUAGE OF THE STATE OF ARIZONA, AND AMENDING THE CONSTITUTION OF ARIZONA BY ADDING ARTICLE XXVIII.

*DESCRIPTIVE TITLE*

AMENDING ARIZONA CONSTITUTION MAKING ENGLISH THE OFFICIAL LANGUAGE OF THIS STATE AND ALL POLITICAL SUBDIVISIONS; REQUIRING ALL GOVERNMENTAL ACTIONS, FUNCTIONS AND DOCUMENTS TO BE IN ENGLISH; PROVIDING EXCEPTIONS FOR COMPLIANCE WITH FEDERAL LAW, LANGUAGE INSTRUCTION, PROTECTING PUBLIC HEALTH AND SAFETY AND PROTECTING CRIMINAL DEFENDANTS AND VICTIMS OF CRIMES.

**PROPOSITION 106**

A "yes" vote shall have the effect of requiring governmental agencies to conduct official business in English with certain exceptions. YES ➜ _____

A "no" vote shall have the effect of maintaining the current language status of conducting the affairs of governmental agencies. NO ➜ _____

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

Robert J. Pohlman, State Bar No. 004601
Stephen G. Montoya, State Bar No. 011791
**BONN & POHLMAN, CHARTERED**
805 North Second Street
Phoenix, Arizona 85004
(602) 254-5557
1447-01
Attorneys for the Plaintiff

MARIA-KELLY F. YNIGUEZ,
Plaintiff,

CIV. NO. 88-1854 PHX PGR

vs.

STATE OF ARIZONA, ROSE MOFFORD, individually, and as Governor of the State of Arizona, ROBERT K. CORBIN, individually, and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona,
Defendants.

---

**AFFIDAVIT OF MARIA-KELLY F. YNIGUEZ**

* * * * *

4. My use of the Spanish language is a part of my being and cultural heritage as a citizen of the United States of America. I exercise my right to speak and write in the Spanish language under the freedoms guaranteed to me by the First and Fourteenth Amendments to the United States Constitution as one of the personal liberties guaranteed to



citizens of the United States of America.

5. If I were denied the right to communicate in the Spanish language, I would be unable to communicate all of my thoughts, concepts, ideas and emotive feelings to persons who are unable to speak the English language but who are capable of understanding the Spanish language. I would also be deprived of my freedom of association with such persons.

6. When I speak Spanish to a Spanish-speaking listener of Hispanic origin, or otherwise familiar with Hispanic culture, such communication includes not only the meaning of the words alone, but also otherwise inexpressible sentiments of shared community, culture and ethnicity as well as to demonstrate my belief that Arizona enjoys a pluralistic society.

7. I am aware from my personal experience in using the English and Spanish languages that emotions, feelings, concepts and ideas which are clearly expressed in one language may not, and often do not, have any clear equivalent in the other language. My facility with the English and Spanish languages has provided me with a larger vocabulary and means of expression, particularly when speaking to bilingual persons. Without the ability to communicate in both languages, my ability to freely and clearly communicate my ideas, concepts, feelings and emotions is impaired.

* * * * *

12. In the course of acting for the State of Arizona as a State Service employee, and with the knowledge and consent of my supervisors, my actions and functions have included communicating verbally and in writing with those

persons asserting medical malpractice claims against the State of Arizona and their legal counsel to determine the nature of their civil claim, the extent of injuries and damages asserted and the propriety of the civil claim. At the request of my supervisors and co-workers, I also have spoken in the Spanish language with persons who speak only Spanish in connection with other claims against the State of Arizona. Among those types of claims with respect to which I have communicated in Spanish are claims of employment discrimination allegedly practiced by the State against minority employees.

13. While speaking to persons who speak only the Spanish language, I explain the policies and procedures of the State of Arizona relating to the assertion of claims by such persons and discuss the merits and facts of their claims. This activity permits me to collect and disseminate information relating to the Risk Management Division's discharge of its statutory responsibilities to the State and people of Arizona. I have previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public and private concern. If I am not permitted to communicate in the Spanish language with persons who speak the Spanish language but not the English language, I will be denied the opportunity to obtain and disseminate information which is of public importance and interest.

14. In the course of acting for the State of Arizona as a State Service employee and discharging my duties to the State and its citizens, I have communicated in both the English and Spanish languages with claimants and their attorneys. I have spoken and/or written in the Spanish language to numerous claimants and attorneys as a natural



and necessary part of my duties.

15. Previously, in the course of acting for the State of Arizona as a State Service employee, I spoke and wrote in the English language to persons who speak only English, in the Spanish language to persons who speak only Spanish, and a combination of the English and Spanish languages to persons who were able to communicate in both the English and Spanish languages. Some of the persons with whom I communicated in a combination of the Spanish and English languages are persons whose English is not sufficiently well-developed to understand all of the English expressions and ideas which I desired or needed to communicate. Some of the persons with whom I communicated in the Spanish language also are capable of communicating in the English language, however, I used the Spanish language for communication because the emotions, concepts, ideas and feelings which I desired to express were, in my judgment and the exercise of my liberties, best and most clearly expressed in the Spanish language.

16. In the course of acting for the State of Arizona as a State Service employee, I frequently used the Spanish language to communicate with bilingual persons as a matter of free choice and as a means of expressing emotions, concepts, feelings, opinions and other expressive ideas to the persons with whom I communicated. As described above in this Affidavit, not all of the communicative uses for which I utilize the Spanish language are susceptible to expression in the English language. Persons to whom I so communicated include other State employees (including other State Service employees), claimants and attorneys representing claimants.

17. In the course of acting for the State of Arizona

as a State Service employee, with the knowledge and consent of my supervisors, I have prepared legal documents in both the English and Spanish languages to ensure that citizens who were unable to understand the English language could understand the legal import of the document they were asked to sign.



**THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

[Initial Address Omitted]

[Caption Omitted]

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CIV. NO. 88-1854 PHX PGR

**PLAINTIFF'S STATEMENT OF FACTS IN SUPPORT OF APPLICATIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

* * * * * *

3. Kelly is a State Service employee employed by the State of Arizona in the Risk Management Division of the Department of Administration. She is the Medical Program Administrator and, among other duties, manages medical malpractice claims asserted against the State of Arizona or physicians for whom the State provides insurance on a self-insurance basis. She has been so employed since 1984. [Yniguez Aff. ¶ 9]

* * * * *

5. Kelly's actions and functions performed during the conduct of her duties as a State Service employee do not include any actions or functions which are designed or intended to:

a. Assist students who are not proficient in the English language or provide educational or foreign language instruction of any kind;

b. Protect the public health or safety; or

c. Protect the rights of criminal defendants or victims of crime. [Yniguez Aff. ¶ 10]

6. In the course of acting for the State of Arizona as a State Service employee, Kelly's functions and actions on behalf of the State of Arizona include communicating with those persons asserting medical malpractice claims against the State of Arizona and their legal counsel to determine the nature of their civil claim, the extent of injuries and damages asserted or suffered and the propriety of the civil claim. [Yniguez Aff. ¶ 12]

7. Kelly is bilingual, fluent and literate in both the Spanish and English languages. Spanish and English are Kelly's two natural languages. Kelly thinks in both languages and, in the course of otherwise unimpeded conversation, naturally alternates between the two languages to appropriately express herself to persons who are able to understand her. She considers the Spanish language to be a part of her cultural heritage. [Yniguez Aff. ¶¶ 2, 3, 4 and 6]

8. In the prior course of acting for the State of Arizona as a State Service employee and discharging her duties to the State, Kelly communicated in both the English and Spanish languages with claimants and their attorneys. She has spoken the Spanish language to claimants and attorneys as a natural and necessary part of acting and functioning on behalf of the State. [Yniguez Aff. ¶ 14]

9. In the prior course of acting for the State of Arizona as a State Service employee, Kelly spoke the English language to persons who speak only English, the Spanish language to persons who speak only Spanish, and a combination of the English and Spanish languages to persons who were able to communicated in both languages. Some of the persons with whom she communicates in a combination of the Spanish and English languages were persons whose



command of the English language was not sufficiently well-developed to understand all of the English language expressions and ideas which Kelly desired to communicate. Some of the persons with whom she communicates in the Spanish language also could communicate in the English language, but Kelly communicated in the Spanish language because the emotive ideas and feelings which she desired to express were, in her judgment and the exercise of her liberties, best and most clearly expressed in the Spanish language. In addition, Kelly communicated in the Spanish language to express otherwise inexpressible concepts and ideas, such as her cultural heritage as a Hispanic, the sense of community and experiences shared by Hispanics and other feelings. [Yniguez Aff. ¶¶ 15 and 16]

10. In the course of acting for the State of Arizona as a State Service employee, Kelly has drafted legal documents in both the English and Spanish languages to enable persons who were unable to understand the English language to comprehend the legal import of the document they were signing. [Yniguez Aff. ¶ 17; Affidavit of Robin L. Perin, ¶ 4, the "Perin Aff."; Affidavit of James Mullen, ¶ 5, the "Mullen Aff."] She also communicated in the Spanish language pertaining to matters of public interest and importance. Kelly has previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public and private concern. [Yniguez Aff. ¶ 13]

* * * * *

14. Language is the means by which persons express and communicate their thoughts, ideas and emotions. Any particular language does not express the same ideas and feelings in the same manner or with the same effect as a different language. Many emotive ideas and feelings are

more clearly communicated in one language than another. Feelings and ideas which are clearly expressed in one language may not, and often do not, have any linguistic equivalent in another language. The words which comprise a language express distinct ideas and a person able to speak in more than one language has, in effect, a larger vocabulary and reservoir of expression. [Yniguez Aff. ¶ 7]

* * * * *

35. Kelly, being the only person in the Risk Management Division capable of communicating in Spanish, believes that her ability and freedom to express her ideas and feelings in Spanish are and will be restrained by the Article and, if such ability and freedom were exercised in the manner in which they were freely exercised prior to the adoption of the Article, would subject her to suit by persons residing or doing business in the State of Arizona and/or employment-related sanctions by the Defendants. Due to her concerns, Kelly has ceased to communicate in languages other than English pending a judicial determination of her rights. Her concerns and the degree of her anxiety has been exacerbated by the inconsistent and vacillating positions of the Governor and Attorney General with respect to matters [illegible] Proposition 106 and Article XXVIII. [Yniguez Aff. ¶¶ 11, 20, 21, 22 and 23].



**THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

[Initial Address Omitted]

[Caption Omitted]

CIV. NO. 88-1854 PHX PGR

ANSWERS TO PLAINTIFF'S FIRST SET OF NON-UNIFORM INTERROGATORIES AND REQUESTS FOR ADMISSION

[Definitions and Instructions Omitted]

* * * * * * * * *

REOUEST FOR ADMISSION No. 34: Admit that Maria-Kelly F. Yniguez' use of a language other than English in the course of her performing government business contributes to the efficient operation of the State.

Admit.

REOUEST FOR ADMISSION No. 35: Admit that Maria-Kelly F. Yniquez' use of a language other than English in the course of her performing government business contributes to the efficient administration of the State.

Admit.

REQUEST FOR ADMISSION NO. 36: Admit that the efficient operation of the State is enhanced by permitting State service employees to communicate with citizens of the State in languages other than English.

Admit – if these citizens are not proficient in English-

REOUEST FOR ADMISSION- No. 37: Admit that the efficient administration of the State is enhanced by permitting State service employees to communicate with citizens of the State in languages other than English.

Same answer as No. 36.

REQUEST FOR ADMISSION NO. 38: Admit that language conflicts and ethnic separatism threaten to erode the English language.

Objection, it calls for pure opinion.

REOUEST FOR ADMISSION NO. 39: Admit that the use of languages other than English by citizens of the State of Arizona threatens to erode the English language.

Objection. See No. 38.



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

[Initial Address Omitted]

MARIA-KELLY F. YNIGUEZ and
JAIME P. GUTIERREZ
Plaintiffs,

**CIV. NO. 88-1854 PHX PGR**

vs.
ROSE MOFFORD, individually and as Governor of the State of Arizona, ROBERT K. CORBIN, individually and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona,
Defendants.

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**SECOND AMENDED COMPLAINT**
(Civil Rights and Injunctive and Declaratory Relief)

The Plaintiffs for their Second Amended Complaint against the Defendants allege as follows:

**JURISDICTION AND VENUE**

1. This Complaint arises from the Defendants' actual and threatened infringement of the Plaintiffs' rights under the First and Fourteenth Amendments to the Constitution of the United States. Accordingly, the Plaintiffs bring this action pursuant to 42 U.S.C. § 1983; this Court's jurisdiction rests on 28 U.S.C. §§ 1331, 1343, and 2201.

2. Venue in this action is appropriate in the District

of Arizona pursuant to 28 U.S.C. § 1391 (b).

**STATEMENT OF THE CLAIMS**

3. Plaintiff Maria-Kelly F. Yniguez is of Hispanic descent and is a citizen of the United States of America who resides in Maricopa County, Arizona. Plaintiff Jaime P. Gutierrez is of Hispanic descent and is a citizen of the United States of America who resides in Pima County, Arizona.

4. The Plaintiffs are each bilingual, fluent and literate in both Spanish and English.

5. Maria-Kelly F. Yniguez has been employed as a State Service employee in the Risk Management Division of the Department of Administration of the State of Arizona since approximately 1984 and is still so employed.

6. Jaime P. Gutierrez is an elected government official, an Arizona State Senator, and is a member of the Arizona State Legislature.

7. Defendant Rose Mofford is the Governor of the State of Arizona. Defendant Robert K. Corbin is the Attorney General of the State of Arizona. Defendant Catherine Eden is the Director of the Department of Administration of the State of Arizona. The individual Defendants are responsible for the administration of the laws of the State of Arizona.

8. As a condition of her employment with the State of Arizona, Maria-Kelly F. Yniguez was required to execute a loyalty oath in which she pledged, inter alia, to "support the Constitution and the laws of the State of Arizona" and to "bear true faith and allegiance to the same."

9. The State of Arizona has adopted specific standards of required conduct for State employees, violation of which "is cause for discipline or dismissal of a State Service employee." Among the required standards of conduct is the obligation that State employees "[c]omply with State Laws and Rules." (A.C.R.R. R2-5-501)



10. As a condition to his receiving compensation as a State Senator by the State of Arizona, Jaime P. Gutierrez was required to execute a loyalty oath in which he pledged, inter alia, to "support the Constitution and the laws of the State of Arizona" and to "bear true faith and allegiance to the same" as required by A.R.S. § 38-231. As a member of the State Legislature, Jaime P. Gutierrez has a duty to uphold the laws of the State of Arizona, including its Constitution.

11. The Constitution and laws of the State of Arizona provide, inter alia, for the impeachment of elected State officials for "high crimes, misdemeanors or malfeasance in office." (Ariz. Const. art. VIII.)

12. As part of her official duties as an employee of the State of Arizona, Maria-Kelly F. Yniguez communicates with those persons asserting medical malpractice claims against the State of Arizona. In that regard, she communicates in Spanish with claimants who are fluent in Spanish but who are unable to speak and understand English and with claimants who speak and understand English but elect to communicate in Spanish.

13. Moreover, prior to November 8, 1988, Maria-Kelly F. Yniguez often spoke in Spanish to Spanish speaking co-workers while conducting official State business. Thus, Maria-Kelly F. Yniguez had exercised the right and privilege of discharging her employment duties in her two natural languages before November 8, 1988.

14. As a part of his official duties in conducting government business in and for the State of Arizona, Jaime P. Gutierrez communicates with State employees and officials, citizens of the State of Arizona and others. In that regard, he communicates in Spanish with persons who are fluent in Spanish but who are unable to speak and understand English and with persons who speak and understand English but elect to communicate in Spanish.

15. On or around November 8, 1988, a majority of the citizens of the State of Arizona voting in a general election approved an initiative measure to amend the Arizona Constitution by adding Article XXVIII to the Arizona Constitution.

16. Article XXVIII declares English to be the "Official Language" of the State of Arizona and mandates that, inter alia, "the English language is the language of the ballot, the public schools and all government functions and actions" and that the "State and all political subdivisions of this State shall act in English and in no other language." (Emphasis added.) Article XXVIII binds "all government officials and employees during the performance of government business." (Emphasis added.) Thus, Article XXVIII requires all State employees and elected officials to act exclusively in English while performing government business.

17. Article XXVIII further provides that any "person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection." (Emphasis added.) Article XXVIII, however, neither specifies nor limits remedies available or authorizes legislation to do so.

18. Defendants Mofford, Corbin and Eden are responsible for implementing and enforcing Article XXVIII.

19. Because Article XXVIII prohibits State employees from using languages other than English "during the performance of government business" and a condition of Maria-Kelly F. Yniguez's employment with the State of Arizona is that she abide by the Arizona Constitution, her employment is subject to termination or other sanctions if she speaks Spanish while conducting official State business.

20. Because Article XXVIII prohibits State officials from using languages other than English "during the



performance of government business," Article XXVIII interferes with Jaime P. Gutierrez's rights to communicate freely with persons who speak languages other than English, including persons from his Senate district.

21. Furthermore, because Article XXVIII grants standing to any person residing or doing business in Arizona to enforce Article XXVIII, Maria-Kelly F. Yniguez and Jaime P. Gutierrez are also in danger of incurring not only liability for using Spanish in the course of their employment and performance of government business, but exposure to a multiplicity of lawsuits and to remedies of an unknown nature.

22. The First and Fourteenth Amendments to the Constitution of the United States guarantee the rights of Maria-Kelly F. Yniguez and Jaime P. Gutierrez to use Spanish in the course of their employment and performance of government business.

23. Because Article XXVIII subjects the Plaintiffs to employment discharge or other sanctions, the threat of lawsuits, and/or other liability for using Spanish during the performance of government business, the Plaintiffs are fearful of exercising their rights under the First and Fourteenth Amendments to the United States Constitution and have consequently refrained from fully exercising those rights since the passage of Article XXVIII. The Plaintiffs' fearful forbearance from fully exercising their First and Fourteenth Amendment rights constitutes irreparable injury warranting injunctive relief.

24. Similarly, because Article XXVIII subjects the Plaintiffs to employment discharge or other sanctions, the threat of lawsuits, and/or liability for using Spanish during the performance of government business, Article XXVIII violates the Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

25. Additionally, since Article XXVIII intentionally

discriminates against Plaintiffs based upon their ancestral origin without legitimate State interest, Article XXVIII violates their rights under the Fourteenth Amendment to the United States Constitution.

26. Lastly, upon information and belief, the Plaintiffs' compliance with Article XXVIII violates 42 U.S.C. § 2000d and subjects the Plaintiffs to personal liability therefor.

**DEMAND FOR JUDGMENT**

WHEREFORE, the Plaintiffs pray for judgment against the Defendants jointly and severally as follows:

A. For an injunction, both interim and permanent, restraining the Defendants, their political subdivisions, departments, agencies, organizations, instrumentalities, officers, employees and agents from implementing, enforcing or threatening to enforce Article XXVIII;

B. For a declaration that Article XXVIII violates the First and Fourteenth Amendments to the United States Constitution and is therefore null and void;

C. For a declaration that compliance with Article XXVIII violates 42 U.S.C. § 2000d;

D. For an award of their attorneys' fees and costs; and

E. For all other relief that the Court deems just and proper under the circumstances.

RESPECTFULLY SUBMITTED this 17th day of January, 1989.

**BONN & POHLMAN, CHARTERED**
Robert J. Pohlman
Stephen G. Montoya
805 North Second Street
Phoenix, Arizona 85004
Attorneys for the Plaintiffs



**ARIZONA ATTORNEY GENERAL**
**OPINION I89-009**

***Attorney General***
***1275 West Washington***
***PHOENIX, ARIZONA 85007***
***ROBERT K. CORBIN***

January 24, 1989

The Honorable Robert B. Usdane
President of the Senate
State Capitol - Senate Wing
Phoenix, Arizona 85007

RE: I89-009 (R88-136)

Dear Senator Usdane:

We have been asked a number of general and specific questions concerning the constitutionality and effect of Proposition 106 on the delivery of governmental services and on some governmental activities. We conclude that Proposition 106, which adds to the Arizona Constitution article XXVIII, entitled English as the Official Language, is constitutional and will not greatly change the way government operates presently.

It is our duty to give Proposition 106 a construction that is compatible with the United States Constitution and federal laws. See Ariz. Const. Art. II, § 3 ("The Constitution of the United States is the supreme law of the land."); State v. Ramos, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982); Schecter v. Killingsworth, 93 Ariz. 273, 282, 380 P.2d 136, 142 (1963). We must also interpret this amendment to the Constitution as a whole and in harmony with the other portions of the Arizona Constitution. State ex rel. Nelson v. Jordan, 104 Ariz. 193, 196, 450 P.2d 383, 386 (1969); State ex rel. Jones v. Lockhart,

76 Ariz. 390, 398, 265 P.2d 447, 453 (1953). Guided by these principles, we conclude that the language of Proposition 106 does not prohibit the use of a language other than English to facilitate the delivery of governmental services. Additionally, Proposition 106 specifies in subsection 3(2)(b) that the "State may act in a language other than English . . . to comply with other federal laws."

Consequently, we do not conclude that Proposition 106 requires a diminution or unreasonable restriction of services or the placing of barriers to access to governmental processes for non-English speakers, because such an interpretation is not required by the text of the amendment itself and could be inconsistent with applicable federal law and the Arizona and United States Constitutions.



Turning now to the language of the Proposition itself, it suggests that the purpose of the amendment is to require that official acts of government be expressed in English as the state's official language. It does not prohibit the use of other languages when they are reasonably required in the day-to-day operation of government.

Proposition 106 contains four sections. Section 1 states that "The English language is the official language of the State of Arizona," and goes on to provide that "As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions." (Emphasis added.) The remainder of section 1 makes clear that this status of English as the official language applies to all branches and levels of government, to all official documents, and to all officials and employees.



Section 2 provides that "This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona." Neither section 1 nor section 2 contain any language prohibiting the use of any language other than English.

Section 3 does, however, contain terms which prohibit governmental acts in a language other than English. After providing for certain exceptions, subsection 3(a) states: "This State and all political subdivisions of this State shall act in English and in no other language." (Emphasis added.) Subsection 3(b) prohibits governmental entities from requiring the use of a language other than English, and 3(c) states that governmental documents must be in English to be valid and enforceable. The exceptions to the requirement that governmental entities act in English are (in accurate paraphrase): (a) to assist in English-as-a-second-language instruction; (b) to comply with federal laws; (c) to teach a foreign language; (d) to protect public health or safety; and (e) to protect the rights of criminal defendants or victims of crime.

Section 4 provides for a private cause of action to enforce the article.

Most of the concerns raised in the opinion request involve the use of a language other than English in the delivery of governmental services. Therefore subsection 3(1)(a), which contains the words "shall act in English and in no other language," is the applicable subsection that will be primarily discussed. (Emphasis added.)



If use of a language other than English is reasonably

needed to provide governmental services fairly and effectively without adversely impacting an ethnic/linguistic group, the use of that language by the deliverer of governmental services is required by federal laws. The federal laws most closely relevant are Titles VI and VII of the Civil Rights Act of 1964, as interpreted by their implementing regulations and by the courts.[1]

> Section 601 of Title VI provides:
>
> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a, defines "program or activity" very broadly as

> a department, agency or other instrumentality of a State or of a local government; or the entity of such State or local government that distributes such assistance and each such department or agency . . . to which the assistance is extended . . . ; or . . . a public system of higher education; or a local educational agency . . . or other school system . . .

If an entity receives no federal financial assistance, its duty to

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[1] Title VI: 42 U.S.C. § 2000d to 2000d-7; Title VII: 42 U.S.C. § 2000e to 2000e-17; for a survey of the Title VI implementing regulations, see Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 618-621 (1983). For the discussion of Title VII interpretations, see infra pp. 7, 9.



provide services (if fairness and effectiveness so require) in a language other than English is, as discussed infra at pp. 6-8, nonetheless not precluded by Proposition 106. We reach this conclusion because of our interpretation that the English-only requirement applies only to official acts of government, and not to every act of every government official or employee. Further, a contrary conclusion would raise serious questions under the equal protection clauses of the United States and Arizona Constitutions.

The Honorable Robert B. Usdane
January 24, 1989
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If a governmental entity is covered by Title VI and appropriate regulations, proof of intentional discrimination (including discrimination based on ethnicity) is not necessary to prove a violation of this federal law. Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983). All that is needed is a showing that the entity applies a rule, even if fair on its face, which has an adverse impact on an ethnic minority, and is not justified by a business necessity.[2]

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[2] This result follows from the language and construction of Title VI and its implementing regulations. At least forty federal agencies have adopted regulations implementing Title VI and applying the disparate impact standard. See Guardians, 463 U.S. at 619, and nn. 6-7. Funding provided by these agencies affects a very broad range of governmental services. See also Alexander v. Choate, 469 U.S. 287 (1985) (state policy having disparate impact on handicapped persons would be prohibited by regulations implementing section 504 of the Rehabilitation Act of 1973 if "meaningful access" to

Linguistic groups are ethnic groups, and non-English speakers in Arizona and the United States meed the criteria of ethnic minorities.[3] If the words in subsection 3(1)(a), "act in English and in no other language" were to be construed to mean that needed governmental services could not be delivered in a language other than English no matter what the needs of fairness and effectiveness, there would be an adverse impact on non-English speakers. Such a construction would result in a violation of federal law. Moreover, the practice of delivery of services in a language other than English (where reasonably needed) would be an exception provided for by subsection 3(2)(b).[4]

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benefits not provided; Title VI regulations referred to as providing guidance for standard).

[3] See, e.g., Yu Cong. Eng. v. Trinidad, 271 U.S. 500 (1926) (Phillipine law prohibiting keeping of account books in any language other than English, Spanish or a local dialect violates equal protection and due process rights of Chinese, in spite of defense that law was needed to facilitate tax collection); Meyer v. Nebraska, 262 U.S. 390 (1923) (prohibition of teaching children in any language other than English which was directed at persons of German descent violates due process clause); Bartels v. Iowa, 262 U.S. 404 (1923) ("Official English" statute directed at persons of German descent violates due process).

[4] See generally, Note 4, "'Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States," 100 Harv. L. Rev. 1345 (1987). See also Lau v. Nichols, 414 U.S. 563 (1974). In Lau, the Court noted that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." 414 U.S. at 566. For the application of



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Thus, if the words of section 3(1)(a), "This State . . . shall act in English and in no other language" were to be construed to mean "shall deliver services in English and in no other language," the subsection 3(2)(b) exception (compliance with federal laws), would almost entirely swallow up the rule. Examining the language of Proposition 106, in context, we do not believe this was what was intended. Although Proposition 106 does not define "act," section 1 gives some guidance, providing, in pertinent part, as follows:

> (2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.
> (3)(a) This Article applies to:
> (i) the legislative, executive and judicial branches of government.
> (ii) all political subdivisions, departments, agencies, organizations, and

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the disparate impact standard (as opposed to requiring proof of intentional discrimination) to "English-only" rules in an employment context, see, Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 1031 (9th Cir. 1988); 29 C.F.R. § 1606.7(b)-(c) (1987); E.E.O.C. Decision 83-7, 31 F.E.P. 1861 (1983). See also Civil Rights Division of the Arizona Department of Law v. Amphitheater Unified School District, 140 Ariz. 83, 680 P.2d 517 (App. 1983) (recognizing disparate impact analysis appropriate to establish a violation of the Arizona Civil Rights Act, and establishing "business necessity" as the proper standard of defense).

instrumentalities of this State, including local governments and municipalities.

(iii) all statutes, ordinances, rules, orders, programs and policies.

(iv) all government officials and employees during the performance of government business.

(Emphasis added.) Because of the broad introductory language of subsection 1(2), clearly



stating that English shall be used for ballots, public schools, and "all government functions and actions," we do not perceive subsection 1(3)(a)(iii) to be an exclusive list, but rather examples of the types of official acts that are contemplated to be covered by Proposition 106.[5] We also look to the dictionary for a common meaning of the word "act". The most clearly applicable common meaning of "act" used as a noun is "a decision or determination of a sovereign, a legislative council, or a court of justice." Webster's International Dictionary 20 (3d ed., unabridged, 1976).

We therefore construe "act" in this context to mean an official act of the government.

Such a construction may also be necessary to avoid

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[5] Enumeration of a list of items in a constitution generally expresses the intent to exclude items not included in the list. Whitney v. Bolin, 85 Ariz. 44, 47, 330 P.2d 1003, 1005 (1958). However, this principle will not be applied to contradict the apparent intent of a provision. Forsythe v. Paschall, 34 Ariz. 380, 383, 271 P. 865, 866 (1928).



conflict with the equal protection clauses of the fourteenth amendment to the federal constitution and article II, section 13 of the Arizona Constitution.[6] Classifications based on ethnicity will be closely scrutinized, and will violate the equal protection clause unless the government can justify them by establishing a compelling interest. Hernandez v. Texas, 347 U.S. 475 (1954); Graham v. Richardson, 403 U.S. 365 (1971) (alienage). Classifications based on language are not in themselves considered, for equal protection purposes, to be invidiously discriminatory classifications based on ethnicity. Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983); Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975); Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973). Where an intent to discriminate on the basis of ethnicity can be shown as a purpose of the language classification, however, an intent to discriminate invidiously may



be inferred. Gutierrez v. Municipal Court of Southeast Judicial

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[6] Article II, section 13 provides:

No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

"The equal protection clauses of the 14th Amendment and the state constitution have for all practical purposes the same effect." Valley National Bank of Phoenix v. Glover, 62 Ariz. 538, 544, 159 P.2d 292, 299 (1945).

District, 838 F.2d 1031, 1039 and n.6 (9th Cir. 1988) (approving the reasoning of Olagues v. Russoniello, 797 F.2d 1511, 1520-21 (9th Cir. 1986) (en banc), vacated as moot, __ U.S.___, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987) (language a proxy for intentional discrimination on basis of ethnicity where ethnic group thus identified carries a history of mistreatment, political exclusion, and historically long-term use of language identified with ethnicity)). Discrimination based on linguistic characteristics has also been directly held to constitute intentional ethnic discrimination in an employment law (Title VII) context. Carino v. University of Oklahoma Board of Regents, 750 F.2d 815 (10th Cir. 1984); Berke v. Ohio Department of Public Welfare, 30 F.E.P. 387 (S.D. Ohio 1978), aff'd, 628 F.2d 980 (6th Cir. 1980) (per curiam).

Intentional discrimination has been inferred where actions by the majority were seen to give governmental effect to private biases. See, e.g., Palmore v. Sidoti, 466 U.S. 429 (1984). Intent has been inferred at least three times by the United States Supreme Court where voters approved popular referendum measures which, although facially fair, had the effect of overturning legislative enactments which legitimately served the needs of minorities. In Reitman v. Mulkey, the California legislature had prohibited racial discrimination in housing. By the passage of Proposition 63, the voters amended the state constitution to overturn and prevent the reenactment of those laws. The Court voided the Proposition as violative of the equal protection clause because it gave effect to private biases in attempting to take away protections already given to minorities. 387 U.S. 369 (1967). The Court followed the same principle in voiding "voter approval" and "voter initiative" measures which purported to reverse antidiscrimination laws enacted by a legislative body. Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle School District No. 1, 458 U.S.



457 (1982).[7]

We do not interpret Proposition 106 as necessitating elimination of assistance provided by government in languages other than English where such assistance is reasonably needed to ensure fair and effective delivery of governmental services to non-English speakers. If this were required, the Proposition could be found to give governmental effect to private biases by taking away protections legitimately offered to those entitled to them, and thus would be voided as a violation, not only of Title VI, but also of the federal and state

The Honorable Robert B. Usdane
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equal protection clauses.[8]

To avoid possible conflicts with the federal and state constitutions and federal laws, we therefore conclude that Proposition 106 cannot interfere with the fair and effective delivery of governmental services in languages other than English, or otherwise affect governmental operations so as to unreasonably disadvantage non-English speakers.

Consistent with this conclusion, we reiterate that the provision of Section 3(1)(a), "This state and all political subdivisions of this state shall act in English and in no other language," means that official acts of government as government shall be in English as the State's official language.

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[7] See also Plyler v. Doe, 457 U.S. 202, 219 (1982) (creation of ethnic "underclass" by excluding minor children of undocumented resident aliens present within the United States from public school system violates equal protection clause).

[8] See also cases cited in n.3, supra.

It does not mean that languages other than English cannot be used when reasonable to facilitate the day-to-day operation of government. With these general conclusions in mind, we are now able to answer the specific questions presented to us.

We have been asked if any restrictions on the use of a language other than English need to be made in any of the following situations:

a. The interaction of state lottery officials with non-English speaking persons . . . either as employees or agents, or as lottery contestants?

A requirement that an employee speak only English on the job, or a requirement that all employees be able to speak English would be a violation of Title VII of the Civil Rights Act of 1964 unless those requirements are bona fide occupational qualifications reasonably necessary to the operation of governmental business. Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 1031 (9th Cir. 1988). A state "Official English" law cannot be used to establish a bona fide occupational qualification. Id. at 1044. The ability to speak English could be a bona fide occupational qualification for an employee if regular contact with the English-speaking public is part of the job requirements, or if an employee would be required, for instance, to interpret official English documents or transmit directions delivered in English. If it is not "reasonably necessary" for all employees of the state lottery to be English proficient in order to perform certain jobs for the lottery, it would be permissible for supervisors to communicate with employees who do not speak English in, or through, another language. Lottery contestants who do not speak English may be communicated within a language other than English in the day-to-day delivery of





services, on the general principles discussed above.

b. The printing of motor vehicle division pamphlets or oral explanation of licensing procedures to applicants for driver and vehicle licensing in languages other than English?

The provision of non-English assistance, whether written or oral, is permissible, and is required if it is necessary to reasonably provide fair and effective services. The nature and extent of the requirement depends on what is both reasonable and necessary for the purpose. See, e.g., Lau v. Nichols, 414 U.S. 563 (1974). What is required also depends on whether or not there are any applicable federal regulations. Moreover, the exemption set out in subsection 3(2)(d) permits use of a language other than English "to protect public health or safety."

c. The naming or designation of highways, streets, bridges, or towns in languages other than English?

The name itself is not an act of government, as we have interpreted the word "act." We perceive a distinction between the use of a word for purposes of identification and the use of language for the purpose of communication of ideas. Further, we recognize that words from other languages historically have been and continue to be absorbed into and become a part of the English language. What Proposition 106 requires is that the governmental acts which create and perpetuate the name be articulated in English. It does not prohibit the use of a non-English name as a street name.

d. The handling of customer inquiries or complaints involving state or local government services, such as ADOT relocation services, child support enforcement, or city water

billings, in languages other than English. Is general communication between elected officials and all other governmental employees with the public at large permissible in other than . . . English?

All official documents that are governmental acts must be in English, but translation services and accommodating communications are permissible, and may be required if reasonably necessary to the fair and effective delivery of services, or required by specific federal regulation. Communications between elected and other governmental employees with the public at large may be in a language other than English on the same principles.



In addition, an elected official may have a federal first amendment right to communicate with constituents in the language of choice. See Garrison v. State of Louisiana, 379 U.S. 64 (1964) (elected official has first amendment protection for statements made in the conduct of his office); Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980) (first amendment right of expression includes right to communicate by most effective means).

e. Discussing professional or business licensing requirements, or accepting license applications, in languages other than English?

Discussions may be in a language other than English, and interpretation services may be provided, but the official application acted upon and the official license issued must be in English.

f. Providing information on state parks services or



programs in languages other than English?

On the same principles, such translations, and direct provision of services in languages other than English are permissible. Since the state parks provide services to visitors from around the world, this question represents a good example of why "shall act" in the Proposition must mean "shall act officially as the government" and not "shall provide services." Moreover, the exemption of subsection 3(2)(d) would permit use of a language other than English if deemed necessary for health and safety reasons in the discretion of those responsible for the parks.

g. Providing information on services or programs offered at common schools or universities in languages other than English?

Again, providing such services and information is permissible and may be required. In particular, educational institutions subject to Title VI should refer to the federal regulations applicable to their agency.

h. The practice of the Governor, employees of the Commerce Department, and other state or local officials or employees visiting with non-English speaking foreign government officials or business representatives of foreign corporations to conduct trade missions and related promotional activities on behalf of Arizona?



Such discussions are permissible, as are translations of any official documents which may result, but the official documents as they are to be acted upon by governments in Arizona must be in English.

i. [W]ith respect to each of the above questions . . . would the answers given change if the non-English speaking persons involved are native Americans?

Our answers would be not be different because the persons involved are native Americans.

In summary, we conclude that Proposition 106 requires official acts of government to be in English. It does not prohibit the use of languages other than English that are reasonably necessary to facilitate the day-to-day operation of government. Proposition 106, therefore, is constitutional, under both the Arizona and United States Constitutions, and compatible with applicable federal law.

Sincerely,

BOB CORBIN
Attorney General

BC:HAS:bl

cc: Senator Peter Kay



**REPORTER'S TRANSCRIPT OF PROCEEDINGS**
**FEBRUARY 13, 1989**

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MARIA KELLY F. YNIGUEZ,
Plaintiff,

vs.

STATE OF ARIZONA, et al.,
Defendants.

Case No. CIV 99-1854 PHX-PGR
Phoenix, Arizona
Monday, February 13, 1989

Plaintiff's Motion for Preliminary Injunction
and Order to Show Cause.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

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* * * * *

**Jaime Gutierrez - Direct**

[21]
BY MR. POHLMAN:

Q Senator Gutierrez, as an elected official of the State of Arizona, do you use the Spanish language?

A Your Honor, Mr. Pohlman, yes, I do, depending on the situation, and depending, again, on my judgment if that person who may or may not be a constituent needs the help of a person who speaks a language other than English.

Q Have you, sir, used the Spanish language in speaking to your constituents?

A Your Honor, yes, I have.

Q And do you do so, in your mind, in your capacity as a state senator?

A Your Honor, Mr. Pohlman, yes, I do. I believe that is part of my job, and that is part of my responsibility to the folks who have voted me in, and to the folks who rely on services of government for much of their everyday life.

Q How often, Senator, would you say you use the Spanish language with your constituents?

A Your Honor, Mr. Pohlman, my guess would be anywhere from two to five times on a weekly basis. It depends, many times, on what types of problems come in and who's calling up.

Q Senator Gutierrez, have you stopped using the Spanish language with your constituents since the promulgation



of
[22]
Article 28?

A Your Honor, Mr. Pohlman, no, I have not.

Q And why is that, sir?

A There is, Your Honor, Mr. Pohlman, a duty on my part tomake sure that folks aren't denied either educational material regarding state government, that they're not denied entry or access into state government for resolution of whatever types of problems one may have. It's important that folks who do not have the -- who have not mastered the English language, that it's important that they not be denied those things that folks who are very fluent in English have and are able to participate in government at the state level.

Q Do you fear enforcement of Article 28?

A Your Honor, Mr. Pohlman, I do a little bit. I've been in the Legislature now for 10 years. I was involved in a proceeding against a public official earlier – or rather, last year. I've been sued twice as a member of the Legislature performing what I thought were my constitutional rights and prerogatives as a member of that Legislature. So yes, I do fear that one of these days I will be the subject of a lawsuit under the basis of Article 28.

* * * * *

**Jane Hill - Direct**

[43]
BY MR. POHLMAN:

Q Dr. Hill, would you describe yourself as a linguistic anthropologist?

A Yes.

Q And could you tell the Court what that is?

A Well, since language is the fundamental way in which

human beings run their affairs and understand their world, the study of language is very important in anthropology, and so some of us specialize in it, and we call ourselves linguistic anthropologists.

Q Is that -- is it fair to say that's a study of language in culture?

A Yes.

Q In the course of your studies as a linguistic anthropologist, have you been involved with the study of language functions at all?

A. Yes, sir.

Q. And could you explain what the language functions are?

A. Yes. Well, most people, I find when I teach, believe that language is for one thing, that is it's to convey

[44]

information from someone who knows something to someone who doesn't know that thing. But in fact, we can identify many functions of language, including the representation of emotions, the manipulation of social contexts to achieve dominance or subordination to another person, the representation of aesthetic reaction, the representation of personal identity, and many different theories of languag[illegible]nction have been proposed, but that's the gist of it.

Q As a cultural -- excuse me, a linguistic anthropologist, do you have an opinion as to whether restricting the use of the language impacts at all on the language functions of a bilingual person?

A. Yes, profoundly.

Q. And could you explain how that occurs?

A. Well, in the study of bilingualism, which is a very important sub-topic in socio-linguistics, the major theory argues this, and that is that mono-lingual people



will use their single language in a variety of functions, and so there will be several ways of speaking. For instance, as an English speaker, I have a number of ways of speaking, depending on who I'm talking to. Among bilinguals, those ways of speaking are likely to be split between the two languages, so that if you tell a bilingual that they can't use one of their languages, this contracts their linguistic repertoire. It makes it impos-

[45]

sible for them to achieve the full range of expression that a mono-lingual would have available to them.

Q They would not, then have the ability to as fully communicate as they previously did?

A That's correct.

Q Doctor, with respect to a language for a -- is language considered an immutable trait?

A. In most contexts, yes.

Q. And why is that?

A. Well, one of the reasons is that people find it very difficult to learn second languages, and particularly to achieve a native speaker's sound to a new language after quite a young age. The estimate of what that age might be varies from as early as one year, to as late as mid-adolescence.

Q Doctor, as a result of your studies have you become acquainted with the importance of Spanish language to Spanish speakers in Arizona?

A. Yes.

Q. And how is that?

A. Well, in socio-linguistics, the study of bilingualism is a central area, and because the Spanish speakers of the American Southwest were probably the biggest community accessible to linguistic scholars, a good deal of basic research, the sort of thing you find in

introductory

[46]

textbooks, has to do with Spanish speakers in the Southwest and Arizona, and so that's how I became acquainted with that literature.

Q. And what conclusions were reached with regard to the Spanish speakers in Arizona?

A Well, all of the authorities conclude that the use of the Spanish language is an important marker of ethnic identity among Spanish speakers in Arizona. The literature describes Arizona Hispanics as a bilingual community, although it's constantly replenished with people from Mexico who may be less fluent in English. The literature describes Arizona Spanish speakers as a community which exhibits what's sometimes called multiglossia, and this is the point that I mentioned earlier about the division of Spanish and English across the several functions. Specifically that Arizona Spanish speakers will tend to use English on more formal occasions. They'll use English with English speakers. They are more likely to use Spanish with other Spanish speakers, and particularly when the context is informal, or when the context requires an emphasis on solidarity, common interest and that sort of thing.

Q Doctor, do you have an opinion as to the effect in Arizona of the use of English only in the government?

A Well, see, Article 28 hasn't been in effect for very

[47]

long. Clearly, it's difficult to see exactly what its effect is going to be. The passage of the amendment I believe was personally quite devastating to Spanish speakers who took it as a personal affront to their patriotism and Americanism.

Q Do you have an opinion, Doctor, as a linguistic



anthropologist as to whether the English only statute will have a disparate impact on any minorities?

A Well, clearly, in the Arizona context, the major impact is going to be on Spanish speakers, and on speakers of Native American languages.

MR. POHLMAN:

I have no further questions, Your Honor.

THE COURT:

You may cross examine.

**Jane Hill - Cross**

BY MR. CHING:

Q Professor Hill, have you read Article 28?

A Yes, I have.

Q Okay. Does Article 28 affect the use of say Spanish or any other language by a person in his home?

A No, sir, I don't believe it does.

Q Does it affect the use of another language, other than English, in the schools?

* * * * *

[48]

A I believe that it excludes bilingual education and the teaching of languages in colleges and universities.

Q Does it affect the teaching at private schools, and the teaching of say, German in the private schools?

A I don't believe it says anything about private schools, sir, no.

* * * * *

[53]

**Maria-Kelly Yniguez - Direct**

* * * * *

BY MR. POHLMAN:

Q. As the -- in the medical malpractice field in which you now function, what are your job duties?

A. I am charged with the responsibility to, whenever a claim is brought against the state, to have it investigated, to evaluate the claim and to make some determination as to how it should be handled. If it falls within my authority limit, I make the determination, and that's it.
Q. And what limit of authority do you have?
A. $10,000.
Q. In that limit of authority, what can you do in order to process claims for the state?
A. I can make a determination, I can determine to settle [54] a claim, I can determine to deny a claim. If I choose to settle a claim, I draw up the documentation so that that can take place.
Q. What form does that documentation take?
A. It would be a release, settlement release.
Q. Settlement agreement and release?
A. Right.
Q. Do you draft those documents on behalf of the state?
A. Yes.
Q. And are those documents reviewed by anyone after you have drafted them?
A. No.
Q. Have you ever drafted any of those documents in the Spanish language?
A. Yes, I have.
Q. And how would that come about that you would do that?
A. I do that in instances where the claimant is a Spanish speaker -- excuse me, a Spanish speaker only, or who does not have the facility with the English language, and therefore would not be informed as to what the agreement was. He would not be able to read it in English, and therefore, so that they can understand the



import of the document they are signing, I do draw them up in Spanish.
Q. All right. Do you also draw them up in English at the same time? [55]
A. At times, yes.
Q. Were there times when that did not occur?
A. Yes.
Q. When the only documentation was in Spanish?
A. Correct.
Q. Have you also had occasion to notify claimants that their claims have been denied by the State?
A. Yes.
Q. Have you ever done that in Spanish?
A. Yes, I have.
Q. And have you done that in writing?
A. I've done it in writing, I speak into them -- even if I convey that to them over the telephone, it still is followed up in writing.
Q. Up to the amount of authority you have, the $10,000, then, is it your understanding you have the capacity to bind the State of Arizona?
A. Yes.
Q. And make final determinations on its behalf?
A. Yes.
Q. Kelly, did you have occasion to sign a loyalty oath upon the hiring of you by the State of Arizona?
A. Yes.
Q. And you have indicated that previously you used the Spanish language in connection with your job? [56]
A. Yes.

* * * * * *

[57]
BY MR. POHLMAN:
Q. Is there any reason why you used Spanish as opposed

to English with those people?

A. Yes. Speaking Spanish with someone who I know speaks Spanish and English, we kind of fall back and forth between the two languages. It's kind of a solidarity thing. It's a comfortableness.

* * * * * *

Q. What have you been told about Proposition 106 at the work place, the Risk Management Division? [58]

A. Shortly after the election, there was a staff meeting in which we were told by the Assistant Director, for the time being -- or what he said was, for now, everything is business as usual.

Q. Since then, what have you been told?

A. I have not been told anything. Since the promulgation, we have not been told anything.

Q. Have you personally taken any action as a result of Proposition 106?

A. Yes. I don't speak Spanish in the work place.

Q. And why is that?

A. I don't speak Spanish in the performance of my job.

Q. And why is that?

A. Because I fear that I would be -- it would be contrary to the amendment. I fear that someone could bring a lawsuit against me.

* * * * *

**Maria-Kelly Yniguez - Cross**

[68]

BY MR. CHING:

Q. In other words, you have your document called a release of claim form, and it is entirely in Spanish?

A. Correct.

Q. And it is signed by the claimant?

A. Correct.

Q. And it is filed in the file?



A. Correct.

Q. Okay. And there's no English counterpart to that document?

A. Not in that file, no.

* * * * * *

[69]

BY MR. CHING:

Q. Okay. The release of claim form, do you draft a separate one every time, or is that something that's done in the word processor, or mimeograph forms, or printed forms?

A. Basically I draw one up specific to that particular claim. A lot of -- if you -- I'm sure you're aware of releases, and a lot of them contain similar language over and over again. But I make it specific to that particular claimant.

* * * * *

[71]

BY MR. CHING:

Q. Okay. So if I were to get hold of these two files, I would see the decision by you written in English, a release of claim form which is only in Spanish, and the TC-50 form, is that correct?

A. Correct.

Q. Okay. And if I were to tell you that I cannot read Spanish, I would have some difficulty in looking at the release of claim form?

A. Correct. I would provide you a translation of it.

Q. You mean, if I asked you?

A. Correct.

Q. But in the file itself, if I was just to order the file, and I look at the relief of claim form, it's entirely in Spanish, it would create some difficulty for a person looking at the file?

A. It probably would.
Q. Okay. Is Fred Cuthbertson your immediate supervisor?
A. Yes, he is.
Q. Okay. So do you know whether he reads Spanish? [72]
A. No, he does not.
Q. So if he were to look at the file, he would understand the decision, he would understand the TC-50 form, but he would not know whether or not the release of claim form is drawn up properly?
A. He would be able to look at the claim forms that we generally use in our division, because it includes the exact same thing as those printed forms that we use in our division.
Q. Yeah. But he would not know.
A. That's correct.
Q. I mean he would assume that this claim form is verbatim some other claim form in English but he wouldn't know.
A. That's correct.
Q. And I wouldn't know.
A. Unless you read Spanish.
Q. And if the Governor would look at it, assuming that she does not read Spanish, she wouldn't know?
A. That's correct.
Q. And if members of the JRVC were to look at it, if they don't have a Spanish speaking person, they would not know?
A. That's correct.



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**
**APRIL 27, 1989**

MARIA-KELLY F. YNIGUEZ, et al., )
Plaintiff, )
)
vs. )
)
STATE OF ARIZONA, et al., )
Defendant. )
_____)

No. CIV-88-1854-PHX-PGR
Phoenix, Arizona
April 27, 1989
9:33 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
DEFENDANTS' MOTION TO DISMISS

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* * * * *

[10]

**Maria-Kelly Yniguez -Cross**

BY MR. CHING:

Q. Okay. If the court were to issue an injunction which you have requested, you would go back to communicating in Spanish with Spanish-speaking claimants at risk management and also you would go back to drawing up claim release forms in Spanish for those claimants?

A. I believe I would, yes.

Q. Is that why you filed a lawsuit?

A. Yes, it is.

* * * * *

[11]

BY MR. CHING:

Q. So you are alleging in this lawsuit that you have a First Amendment right, that constitutional right, and that's directly from your complaint, to communicate with Spanish-speaking claimants in Spanish, and to draw up claim release forms in Spanish for those Spanish-speaking claimants?

A. Correct.

* * * * *

[14]

MR. POHLMAN:

Your Honor, I'm sorry I confused Mr. Ching, and I don't mean to confuse him or the Court. I don't think



we went outside the stipulation.
I simply wanted to explain that -- that there was no written determination that is in the file with regard to claims other than the releases themselves, because I thought that was unclear from the prior record. And there is an instance which is agreed to in the stipulation where the only release that is signed by the claimants is in Spanish.

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

Decision on the Merits.
Entered February 6, 1990
730 F.Supp. 309 (D.C. Ariz. 1990)
Reprinted in Appendix to Petition for Certiorari
Beginning at page 97a.



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

MARIA-KELLY YNIGUEZ and )
JAIME P. GUTIERREZ, )
Plaintiffs, )
vs. )
ROSE MOFFORD, individually and as )
Governor of the State of Arizona, )
ROBERT K. CORBIN, individually and )
as Attorney General of the State )
of Arizona, and as Director of )
individually and as Director of )
the Department of Administration )
of the State of Arizona, )
Defendants. )

No. CIV 88-1854 PHX PGR
JUDGMENT

The issues in this matter having been tried before the court, Honorable Paul G. Rosenblatt, District Judge, presiding, and a decision having been duly rendered that plaintiff Yniguez is entitled to declaratory relief for the reasons stated in the memorandum opinion and order made and entered this date,

IT IS ORDERED AND ADJUDGED that Article XXVIII of the Constitution of the State of Arizona is declared void as being violative of the Constitution of the United States.

Dated this 6th day of February, 1990.

Paul G. Rosenblatt
U. S. District Judge

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

**GUST, ROSENFELD & HENDERSON**
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and Robert D. Park

MARIA-KELLY F. YNIGUEZ )
and JAIME P. GUTIERREZ, )
Plaintiffs, ) No. CIV 88-1854 PHX PGR
v. )
THE STATE OF ARIZONA )
Defendants. )

**MOTION TO INTERVENE**

The Arizonans for Official English Committee and Robert D. Park, individually and as chairman of Arizonans for Official English Committee, move the Court for an order permitting them to intervene in the above-captioned action on the grounds and for the reason they have interests in the subject matter of this action, which interests are unprotected as more specifically set forth in the Memorandum of Points and Authorities and Appendices, including the Affidavit of Robert D. Park (Appendix B) which are made a part hereof by reference.

This motion is made under the provisions of Rule 24,



Federal Rules of Civil Procedure.
[2]

Attached hereto as Appendix E is Notice of Appeal these movants will file on receiving permission of the Court to intervene.

Respectfully submitted this 15th day of February, 1990.

GUST, ROSENFELD & HENDERSON
By: James F. Henderson
Attorneys for Arizonans for Official English Committee and Robert D. Park

**MEMORANDUM OF POINTS AND AUTHORITIES**

This action involves a federal constitutional challenge to Article XXVIII of the Arizona Constitution, "English as the Official Language."[1] This Court, in a Memorandum Opinion dated February 6, 1990, declared Article XXVIII to be "void as being invalid on its face in violation of the First Amendment. ..." In the same opinion, this Court dismissed all defendants save Governor Mofford, who has subsequently publicly announced that she intends not to appeal. See Appendices hereto.

Applicants herein, Arizonans for Official English and Robert D. Park, having a strong and legally protectable interest in the outcome of this issue, seek to intervene pursuant to Fed.R.Civ.P. 24(a) for the purpose of taking an appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

---

[1]The text of Article XXVIII is attached hereto as Appendix A.

[3]

## ARGUMENT

I. Applicants Are Entitled to Intervene Pursuant to Fed. R. Civ. P. 24(a)

Fed. R. Civ. P. 24(a) provides for "intervention of right" as follows:

> Upon timely application anyone shall be permitted to intervene in an action: ( 1) when a statute of the United States confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by other parties.

Applicants here seek intervention under 24(a)(2), based on their interests in the continued vitality of Article XXVIII and the Governor's stated intention not to defend the constitutionality of the article.

Applicants will demonstrate that they meet all elements required to confer a right to intervene under Rule 24(a)(2): first, Applicants possess interests in the subject of the action; second, in the absence of intervention, Applicants will be prevented from protecting their interests; third, Applicants' interests will not be adequately protected by a party; and fourth, Applicants' motion for intervention is timely. Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983).

[4]

A. Applicants Have Interests in the Subject of the Action.

Applicants are a non-profit committee supported by



9,769 citizens of the state of Arizona and an individual who voted in favor of the Amendment. Applicant Arizonans for Official English Committee ("Committee") acted on behalf of those citizens and the public at large in its participation in the events leading to the adoption of Article XXVIII. Applicant Committee was formed for the purpose of promoting adoption of English as the official language of Arizona and has labored in excess of thirteen months and devoted substantial resources to see its efforts to fruition. As the proponent of Article XXVIII, Applicant Committee has a legally protectable interest in the Amendment sufficient to support intervention pursuant to Rule 24(a)(2) in an action challenging the legality of the provision. Washington State Building & Construction Trades Council v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982), cert. denied, 461 U.S. 913, 103 S. Ct. 1891 (1983); Sagebush Rebellion, 713 F.2d at 527. See also, Meyer v. Grant, 486 U.S. 414, 108 *S.* Ct. 1886 (1988) and Washington, et al. v. Seattle School District No. 1, et al., 458 U.S. 457, 102 S. Ct. 3187 (1982).

Applicant Robert D. Park ("Park") has an equally legally protectable interest in the Amendment to support intervention pursuant to said Rule in that his vote has been cancelled by the decision of this Court.

[5]

B. Applicants' Ability to Protect Their Interests Will be Impaired By Disposition of the Action in the Absence of Intervention.

The impairment to Applicants' ability to protect their interests in the absence of intervention is self-evident. The voiding of Article XXVIII will render the substantial labors and contributions of the Applicant Committees' many supporters, Applicant Park's vote and some 580,829 other ballots for naught. More importantly, if intervention is denied, this result

will occur without the benefit of the full examination provided by the appeal procedure available in the judicial system and without providing those with the greatest interest and investment in Article XXVIII the opportunity to be heard in its defense. Such a result would contravene the law of this circuit and fundamental principles of fairness. Sagebrush Rebellion, 713 F.2d at 527-28; Washington State Building and Construction Trades Council, 684 F.2d at 630; Pellegrino v. Nesbit, 203 F.2d 463, 465-66 (9th Cir. 1953).

C. Applicants' Interests Will Not be Adequately Protected by a Party.

Prior to this Court's decision, Applicants' interests were adequately protected by the Arizona Attorney General. The Attorney General, however, has been dismissed from the action on Eleventh Amendment grounds, an argument pressed by the Attorney General as an alternative to his defense of Article XXVIII on the merits. Under these circumstances, the Attorney General has no right of appeal of this Court's decision on the merits. The only [6] party with such a right of appeal has announced that she will not take an appeal, publicly stating that she is "happy" with the ruling and that she believed Article XXVIII to be "flawed from the beginning." See "U.S. judge throws out 'English' law," The Arizona Republic, February 7, 1990, at pages A-1, A-10, and "Say Adios to official-language laws," U.S.A. TODAY, February 12, 1990, at page 10-A. Appendices C and D hereto. The Governor is thus refusing to defend a duly-enacted provision of the Arizona Constitution on the basis of her personal opinions concerning the provision.

It is beyond question that the Governor, the only remaining party-defendant, is not adequately representing Applicants' interests. In fact, the Governor is acting on interests which are diametrically opposed to those of these



Applicants. Where a party declines to appeal an adverse decision or consents to a settlement under similar circumstances, the party cannot be held to adequately represent the interest of a proposed intervenor with an interest in the subject of the action and intervention is appropriate. Pellegrino, 203 F.2d at 465, citing, Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir.), cert. denied, 323 U.S. 777, 65 S. Ct. 190 (1944).

In this instance, a duly-adopted provision of the Arizona Constitution is in jeopardy with no state official both able and willing to advocate its legality. Applicants respectfully submit that intervention by Applicants is the sole way in [7] which the legality of Article XXVIII will be defended and in which Applicants' interests will be protected.

D. Applicants' Motion to Intervene is Timely.

Timeliness of a motion to intervene is measured from the point in time at which it becomes clear that intervention is necessary. United Airlines, Inc. v. McDonald, 432 U.S. 385, 395, 97 S. Ct. 2464, 2470 (1977). In this case, that point was reached when it became clear that Applicants' interests would no longer be protected by a party-defendant. Prior to the dismissal of the Attorney General from this action, Applicants had neither the need nor the right to intervene. Applicants' interests were actively protected during the course of proceedings in this Court. Only upon the dismissal of the Attorney General from the suit did the spectre of inadequate representation arise - a spectre which quickly became fact with the Governor's public abandonment of the defense of Article XXVIII.

Intervention after judgment is appropriate and must be granted where the Applicants meet the criteria of Fed. R. Civ.

P. 24(a) and act promptly after the entry of judgment to move to intervene. United Airlines, 432 U.S. at 394-396, 97 S. Ct. at 2469-2471; Pellegrino, 203 F.2d at 465-466; Legal Aid Society v. Brennan, 608 F.2d 1319, 1328 (9th Cir. 1979), cert. denied, 447 U.S. 921, 100 S. Ct. 3010 (1980); United States v. American Telephone and Telegraph Co., 642 F.2d 1285, 1294-1295 (D.C. Cir. 1980). Applicants here meet those criteria and urge the Court to [8] grant the motion to intervene pursuant to Fed. R. Civ. P. 24(a)(2).

II. Alternatively, the Court Should Grant Intervention Pursuant to Fed. R. Civ. P. 24(b)

Applicants maintain that they are entitled to intervene pursuant to Rule 24(a)(2) because they have interests in the subject of the action which they will otherwise be unable to protect, which interests will be wholly unrepresented by the remaining party-defendant and because Applicants have promptly sought intervention after the dismissal of the Attorney General. However, assuming arguendo that this Court holds to the contrary, Applicants urge the Court to exercise its discretion to grant intervention pursuant to Fed. R. Civ. P. 24(b)(2).

Unlike an action between purely private parties, this action concerns a matter of importance to the entire citizenry of the State of Arizona, both substantively and procedurally. Over one million citizens of the State of Arizona examined their consciences and expressed their opinions on the desirability of the proposition which became Article XXVIII by casting their votes. The majority of those persons who voted for enactment clearly have a strong interest in seeing that Article XXVIII is not rendered lifeless without full examination on appeal of the State and Federal Constitutional concerns. However, Applicants maintain that every voter and every citizen of the



State of Arizona has an interest in seeing that any duly-enacted provision of the State Constitution is fully and vigorously defended through all [9] appeal levels when its legality is challenged. Applicants submit that any duly-enacted State Constitutional provision invalidated by a trial court should have the benefit of appellate review. The citizenry of the State, having elevated a concept to Constitutional status, deserves no less. Unless the Court grants Applicants' motion for intervention in this case, the citizens' interest in preservation of their Constitutional provisions will be subordinated to the personal convictions of the Governor.

Moreover, the particular issues at stake in this action are of broad-reaching regional and even national interest. Such issues should be given the opportunity for appellate review if only to minimize the occurrence of conflicting precedents. Applicants believe that the Court's decision in this case may conflict with prior precedents concerning English language use requirements and urge the Court to allow intervention so that apparent conflicts may be addressed by the appellate court. See, Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987) (business-related English-only rule of private employer held enforceable); Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); Vasquez v. McAllen Bag & Supply, 660 F.2d 686 (5th Cir. 1981)(absent discriminatory intent, English-on-the-job rule not discriminatory against truck driver who speaks only Spanish).

In addition, as the Court's opinion recognizes, the "substantial overbreadth" doctrine is complex and not easily reduced to an exact definition. Since this doctrine has spawned [10] many disputes, Massachusetts v. Oakes, U.S. 1 109 S. Ct. 2633, 2637 (1989); New York v. Ferber, 458 U.S. 747, 767-74, 102 S. Ct. 3348, 3360-63 (1982); Parker v. Levy, 417 U.S. 733,

760, 94 S. Ct. 2547, 2563 (1974); United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 580-81, 93 S. Ct. 2880, 2897-98 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct'. 2908 (1973), the proponents of the initiative should have the opportunity to assert their own interpretation in the appellate court.

Because of the importance of the issues involved, and for the reasons expressed in Applicants' argument in support of intervention as of right, Applicants urge the Court to find these circumstances to warrant intervention pursuant to Fed. R. Civ. P. 24(b)(2) in the event that the Court holds that Applicants are not entitled to intervene pursuant to Fed. R. Civ. P. 24(a)(2).

**CONCLUSION**

For the foregoing reasons, Applicants respectfully request that the Court grant Applicants' Motion to Intervene After Judgment.

Respectfully submitted this 15th day of February, 1990.

GUST, ROSENFELD & HENDERSON
By: James F. Henderson
Attorneys for Arizonans for Official English Committee and Robert D. Park



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

[Initial Address Omitted]

[Caption Omitted]

CIV. NO. 88-1854 PHX PGR

**PLAINTIFF'S RESPONSE TO MOTION TO INTERVENE OF ARIZONANS FOR OFFICIAL ENGLISH COMMITTEE AND ROBERT D. PARK**

Plaintiff Maria-Kelly F. Yniguez responds hereby to the Motion to Intervene filed by Arizonans for Official English Committee and Robert D. Park and respectfully urges this Court to enter its Order denying that Motion because it is untimely, unnecessary and unwarranted.
[2]

This Response is supported by the Court's file herein and the following Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 2nd day of March, 1990.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**Introduction**

This action was commenced on November 10, 1988 by Maria-Kelly F. Yniguez seeking, among other things, declaratory relief concerning the controversial "Official English" amendment to the Constitution of the State of Arizona. The positions of Governor Mofford and her administration with respect to the amendment and this action

were the subject of extensive publicity, both before and after the trial herein. See, e.g. Exhibits to Plaintiffs' Statement of Facts in Support of Application for Temporary Restraining order and Preliminary Injunction filed December 7, 1988; Plaintiffs' and Defendants' Statement of Stipulated Facts filed February 9, 1989 (paragraphs 38 and 39); Appendices to Motion to Intervene filed February 15, 1990. Nearly sixteen months has elapsed since the case was commenced. Discovery has closed, a trial on the merits has been [3] conducted and a judgment entered. Nevertheless, at this late date the proposed intervenors seek to shun the still unimpaired private right of action granted to them in the Official English amendment and belatedly inject themselves into these proceedings for the purpose of "taking an appeal." The requested intervention should be denied because the intervenors lack standing to prosecute an appeal and because their request is both untimely and unnecessary.

## I. THE APPLICANTS ARE NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT

The Ninth Circuit has enumerated a four part standard by which motions to intervene as a matter of right are tested:

> A four part test has been adopted by this circuit to determine whether applications for intervention as a matter of right pursuant to Rule 24(a)(2) should be granted:
>
> > An order granting intervention as of right is appropriate if (1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without intervention the



> > disposition may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties.

County of Orange v. Air California, 799 F.2d 535, 537 (1986). See also, United States v. Stringfellow, 783 F.2d 821 (9th Cir. 1986); United States v. $129,374 in U.S. Currency, 769 F.2d 583 (9th Cir. 1985); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983); County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980). Proper analysis of each of these factors mandates rejection of the requested intervention.

[4]

A. The Motion to Intervene is Untimely

The yardstick for gauging timeliness was also set forth in County of Orange v. Air California, supra:

> In determining timeliness, three factors are weighed: (1) The stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. United States v. State of Oregon, 745 F.2d 550, 552 (9th Cir. 1984). Mere lapse of time alone is not determinative.

799 F.2d at 537. Whether intervention is sought permissively or as a matter or right, the determination as to the timeliness of an application for intervention is a matter left to the trial court's sound discretion. NAACP v. New York, 513 U.S. 345, 366, 93 S.Ct. 2591, 2602, 37 L.Ed.2d 648 (1973):

> Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Ruth 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the action is pending must first

> be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review. (Footnotes omitted)

Here, the applicants ignore the fact that the parties litigant have engaged in discovery and full trial proceedings -proceedings which did not subject applicants or their members to cross-examination, discovery proceedings or any of the other burdens of litigation. This non-participation by the applicants in the discovery and trial process necessarily denied Ms. Yniguez the opportunity to adduce evidence from the applicants. Such evidence might well have provided additional factual support for [5] Ms. Yniguez' alternative claim based upon denial of equal protection. Hence, the applicants' delay in seeking intervention prejudices Ms. Yniguez even beyond the considerable delay and expense to which she would be subjected by an otherwise nonexistent appeal.

Moreover, it is not until after a final judgment has been entered that applicants seek to intervene. The applicants suggest that, up until the announcement of that judgment, their interests were being adequately represented by the original parties. Indeed, it was not until after the judgment was entered that the applicants determined that the end result was not entirely to their liking. A similar argument was rejected by the Ninth Circuit in County of Orange, supra:

> [Applicant] argues that it did not intervene sooner because it did not know until August 20, 1985, the date it learned of the proposed Stipulated Judgment, that its interests were not



> being adequately represented by the original parties. In other words, this was allegedly the first time that [applicant] realized that the end result of the protracted litigation would not be entirely to its liking. In Alaniz, the crux of the appellant's argument was that they did not know the settlement decree would be to their detriment. We held that, surely, they should have known the risks of waiting. Alaniz, 572 F.2d at 659. "To protect their interests, appellants should have joined the negotiations before the suit was settled." Id. In the case at bar, [applicant] should have realized that the litigation might be resolved by negotiated settlement. The local newspapers reported the ongoing negotiations between the parties.
>
> * * * *
>
> In order to protect itself against this eventuality, [applicant] should have intervened sooner. The district court did not abuse its discretion in denying, because it was untimely, [applicant's] Motion to Intervene.

799 F.2d at 538. Similarly, the applicants here should have realized that this litigation might be resolved by an adverse [6] judgment including dismissal of the attorney general as a party defendant. As was the case in County of Orange, supra, the newspapers reported the progress of the ongoing litigation. As in County of Orange, supra, the applicants here should have known the risks of waiting and should have intervened sooner to protect themselves against the eventuality they now believe to be prejudicial. As in County of Orange, supra, this Court should find the Motion to Intervene to be untimely.

B. The Applicants Have No Legally Protected Interest in

the Proceedings Sufficient to Sustain Jurisdiction On Appeal

The "interest" asserted by the applicants in the subject of this action is simply that they were and are proponents of Article XXVIII, Constitution of the State of Arizona -- no more and no less. But, no matter how interested and desirous applicants may be to urge the validity of that amendment, their desire does not equate to a legal entitlement to appeal this Court's Judgment. See Diamond v. Charles, 476 U.S. 54, 90 L.Ed.2d 48, 106 S.Ct. 1697 (1986). In Diamond, a physician who had intervened as a party in interest in the district court sought to appeal to the United States Supreme Court the district court's determination (affirmed by the Seventh Circuit Court of Appeals) that portions of the Illinois Abortion Law of 1975 were unconstitutional. The State of Illinois chose not to appeal those determinations, despite the fact that its own statute was at stake. The Supreme Court refused to grant standing to the physician proponent of the statute holding:

> Because a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense, we dismiss the appeal for want of jurisdiction.

[7]

476 U.S. at 56. Relying on the "case or controversy" requirement of Article III of the Constitution, the Court noted:

> The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art III's requirements. This court consistently has required, in addition, that the party seeking judicial resolution of a dispute "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" of the other party.



* * * *

> The decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." (citation omitted] It is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests."

476 U.S. at 62. Thus, simply demonstrating an interest in the outcome of litigation is insufficient to confer a right to appeal. Rather, an appellant must be able to show both an interest and a direct stake in the outcome of the litigation. Here, the applicants have no such direct stake. All they have is an abstract desire that the amendment as written be obeyed. See Diamond, supra (concurring opinion of Justice O'Connor) 476 U.S. at 75-76. In the absence of the original defendants, the applicants are unable to demonstrate any standing that would permit them to appeal the judgment entered herein. Under the circumstances, they have no legally protectable interests in the amendment to support intervention for purposes of appeal. Diamond v. Charles, supra.

C. The Applicants' Right to Enforce the Amendment in State Court Remains Unimpaired

Perhaps the most significant deficiency in the Applicants' Motion to Intervene is their inability to demonstrate that their interests will be impaired as a result of this Court's [8] Judgment. Article XXVIII of the Constitution of the State of Arizona expressly provides citizens an unfettered right to enforce its terms through a private right of action:

> 4. Enforcement, Standing.
>
> Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State.

As a consequence, the applicants may commence their own independent private enforcement action at any time they believe the amendment is being violated. Their right to commence such independent actions has not been abrogated by this Court's Judgment. Indeed, in its Memorandum Opinion and Order herein, this Court expressly recognized that its interpretation is not binding on state courts:

> Given this interpretation of the Article, an interpretation obviously not binding on state authorities; id.; Webster v. Reproductive Health Services, __ U.S. __ , 109 S.Ct. 3040, 3060 (1989)(O'Connor, J., concurring), the court concludes that there is a realistic danger of, and a substantial potential for, the unconstitutional application of Article XXVIII.

Memorandum Opinion and Order filed February 6, 1990, page 12, lines 3-8. The independent right granted to applicants in Article XXVIII itself remains unimpaired. This Court's determination, binding as between the parties hereto, does not eviscerate the applicants' ability to invoke the remedies provided in Section 4. Under the circumstances, applicants have suffered no impairment or impediment to their ability to protect their legal interests. Consequently, they fail to satisfy the third prong of the test governing intervention as a matter of right.

[9]

D. The Applicants' Interests Are Identical to Defendants and Are Adequately Represented

Finally, the applicants contend that their interests are not now being adequately represented by Governor Mofford. According to the applicants, this sudden inadequacy has arisen because Governor Mofford may decline to appeal. While the applicants may not agree with that decision (should it be made), nevertheless, their disagreement does not transform Governor



Mofford's position into one of inadequate representation.

Adequate representation is normally presumed where a litigant representative is a governmental officer charged by law with such representation. Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3rd Cir.) ("... a presumption of adequate representation generally arises when the representative is a government body or officer charged by law with representing the interests of the absentee.") cert. denied, 426 U.S. 921 (1976). In Rizzo, supra, intervention was denied to an applicant who contended that the representation afforded by the governmental authorities was inadequate because it resulted in a settlement. The court rejected that contention noting that any case -- even one being vigorously defended -- may culminate in a consent decree:

> That [intervenors] would have been less prone to agree to the facts and would have taken a different view of the applicable law does not mean that the [defendants] did not adequately represent their interests in the litigation.

530 F.2d at 505. Certainly, if adequate representation may culminate in a consent decree, representation of the interests here at issue is rendered no less adequate by a considered [10] decision not to appeal the final determination of the trial court. As conceded by the applicants, the governmental representatives in the case at bar vigorously defended and adequately represented their interests throughout the trial of this matter. Indeed, because the legal interests of the State and the applicants are identical, this Court can presume that the interests of the applicants are adequately represented. Chiles v. Thornburgh, 865 F.2d 1197, 1215 (llth Cir. 1989) (" ... where [the] interest of [a] proposed intervenor is the same as that of one of the parties, court can presume that the interest is adequately represented."). See also, Athens Lumber Co. Inc. v.. Federal Election Commission, 690 F.2d 1364 (11th Cir. 1982).

Based on the foregoing, the applicants have not carried their burden of proving that their interests are not adequately represented by Governor Mofford.

## II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO DENY PERMISSIVE INTERVENTION

In Chiles v. Thornburgh, supra, the Eleventh Circuit Court of Appeals described the standards applicable to a party seeking permissive intervention:

> A party seeking to intervene under Rule 24(b)(2) must show that: (1) his application to intervene is timely; and (2) his claim or defense and the main action have a question of law or fact in common. The district court has the discretion to deny intervention even if both of those requirements are met, and its decision is reviewed for an abuse of discretion. Sellers v. United States, 709 F.2d 1469, 1471 (llth Cir. 1983).

865 F.2d at 1213. The applicants either knew or reasonably should have known of their interest in this case long ago. Rather than seek intervention at an early stage -- when full discovery would have been available and hence no prejudice would [11] inure to the litigants -- the applicants chose instead to permit the case to proceed through trial and final judgment before asserting their interests. Under the circumstances, their request for permissive intervention is not timely. County of Orange v. Air California, supra.

Although the applicants claim that the question of the constitutionality of Article XXVIII is a common legal question justifying intervention, the fact remains that the applicants have alternative avenues they are legally entitled to pursue to adjudicate this question. Ms. Yniguez has fully litigated and



obtained the relief she sought against her employer. She should not now be subjected to an appeal by an outside party that has neither need nor right to interfere in this dispute. Under the circumstances, this Court should exercise its discretion to deny permissive intervention.

## Conclusion

The applicants' Motion to Intervene is untimely and prejudicial. The applicants have no standing to pursue an appeal because they have no direct stake in the outcome of this litigation. Moreover, the legal interests of the applicants are fully protected by their unimpaired right to pursue private causes of action granted by Article XXVIII. The representation provided by the State has been concededly adequate. Based on the foregoing, this Court is respectfully urged to enter its order denying applicants' Motion to Intervene either as a matter of right or permissively.

DATED this 2nd day of March, 1990.
POHLMAN & SANDERS
A Professional Association
Counsel for Plaintiffs

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

[Initial Address Omitted]

[Caption Omitted]

No. CIV 88-1854 PHX PGR

**MOVANTS ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK'S REPLY RE: THEIR MOTION TO INTERVENE**

On February 6, 1990, the Court issued a Memorandum Decision and Order declaring that Article XXVIII of the Arizona Constitution violated the First Amendment of the United States Constitution. On February 15, 1990, Arizonans for Official English Committee and Robert D. Park ("Movants") filed a Motion to Intervene After Judgment for purposes of appeal. On March 2, 1990, plaintiff and defendants filed Responses to the Motion to Intervene; defendants have no objection to the intervention.[1]
[2]

[1]On February 16, 1990 Defendant Corbin filed a Motion to Alter or Amend Judgment. On March 2, 1990, the State of Arizona, ex rel. Attorney General Robert K. Corbin, filed a [2] **(CONT.)** Motion to Intervene. Because movants are not yet admitted to the case and because movants are reluctant to use a reply memorandum to address issues not raised in Plaintiff's Response to the Motion to Intervene, North v. Madison Area Association for Retarded Citizens-Developmental Centers, 844 F.2d 401, 405 n.6 (7th Cir. 1988), movants have not addressed either Motion in this Memorandum.



**I. PLAINTIFF DOES NOT UNDERSTAND THAT THIS MOTION IS FOR POST-JUDGMENT INTERVENTION.**

Plaintiff's Response to Motion to Intervene of Arizonans for Official English Committee and Robert D. Park ("Plaintiff's Response") opposes intervention by movants using interesting, but irrelevant citations; this motion is for intervention after judgment, a distinctly different situation than exists in the cases she cites.

Plaintiff does not address the long line of Supreme Court and Ninth Circuit cases involving intervention after judgment. See, e.g., United Airlines v. McDonald, 432 U.S. 385, 97 S. Ct. 2464 (1977). In McDonald, stewardesses dismissed for violating a no-marriage rule proved a violation of Title VII; after the airline settled with several named plaintiffs, a putative class member[2] moved to intervene after judgment. The Supreme Court, in McDonald, 432 U.S. at 394 n.16, cites many cases supporting intervention after judgment, including Pellegrino v. Nesbitt, 203 F.2d 463 (9th Cir. 1953). Justice [3] Stewart, for the Court, said: "The critical inquiry in every such case is whether in view of all the circumstances, the intervenor acted promptly after the entry of final judgment." 432 U.S. at 394-5. In McDonald, the Court held that filing a motion to intervene within the period for appeal was timely filing. 432 U.S. at 396.

[2]Post judgment intervention for the purpose of appeal has been found to be timely even in litigation that is not representative in nature and in which the intervenor might therefore be thought to have a less direct interest in participation in the appellate phase." (citation omitted.) 432 U.S. at 395, n.16.

II. **PLAINTIFF'S OBJECTIONS ARE MISPLACED.**

In light of McDonald and similar federal cases allowing post-judgment intervention, none of plaintiff's objections to intervention are valid:

A. Movants filed in time. (Plaintiff's Response, 4.)

Movants filed their motion less than ten days after the decision was handed down. "[T]he respondent filed her motion within the time period in which the named plaintiffs could have taken appeal. We therefore conclude that the Court of Appeals was correct in ruling that the respondent's motion to intervene was timely filed and should have been granted." 432 U.S. at 396.

B. Movants did not need to intervene earlier. (Plaintiff's Response, 4-6.)

Movants might have moved prior to the consideration of the motion to dismiss the complaint[3]. Sensitive to the [4] jurisprudential need to avoid multiplying litigation, however, Movants chose to abide by the principles of Federal Rules of Civil Procedure 1: "They [these rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

The Supreme Court in McDonald, a case which

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[3]The proceeding which plaintiff refers to as a "full trial proceedings", Plaintiff's Response, 4, was, in fact, a series of hearings on motions to dismiss, which the Court chose to treat as motions for summary judgment following the presentation of evidence beyond the pleadings. Memorandum Opinion and Order, Feb. 6, 1990, 3. The parties stipulated to combining the "trial on the merits" with the evidentiary hearing on plaintiff's [4] motion for preliminary injunction. Id.



determined the timeliness of post-judgment intervention in just such situations, warned that "[i]ntervention at that [earlier] time would have made the respondent a superfluous spectator in the litigation ... Moreover, such a rule would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination." 432 U.S. at 395, n.15[4].

Nor is plaintiff's complaint that she did not have access to discovery against movants well taken. Plaintiff knew of movants' status as proponents and of movants' presence within [5] the district; at all relevant times during these proceedings, movants were amenable to discovery or subpoena. See, e.g., Index of Exhibits to Plaintiff's Statement of Facts in Support of Applications for Temporary Restraining order and Preliminary Injunction, Exhibits No. 2, 4 ("The chief spokesman for the ballot measure, Bob Park, ... chairman of Arizonans for Official English ..."), 7 ("Bob Park, the chief spokesman for the ballot

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[4]Plaintiff contends that City of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986), cert. denied sub nom. Irvine v. County of Orange, 480 U.S. 946, 107 S. Ct. 1605 (1987), suggests that movants motion is untimely. In Orange, settlement negotiations had gone on for five years with many different parties; disrupting the negotiations by allowing intervention, the district court specifically found "would be tantamount to disaster here." 799 F.2d at 538. No such delicately balanced and complex negotiations are at work in this case--movants do not seek new trial level proceedings, only the appeal of a judgment. Nor do courts read this case as requiring all potential intervenors to second-guess every possible outcome. Grubbs v. Norris, 870 F.2d 343 (6th Cir. 1989) (adopting City of Orange standard, but refusing to "demand of potential intervenors that degree of prescience.")

measure, ... chairman of Arizonans for Official English ). Plaintiff had every opportunity to join necessary third parties or to avail herself of discovery against movants at any stage of the proceeding. Federal Rules of Civil Procedure 19, 20, 26, 27, 30, 34(c), 45; United States Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72, 108 S. Ct. 2268, 2272 (1988). She cannot now claim that movants should be denied participation in this case because she chose not to exercise the available discovery rights she now claims were essential.

C. Plaintiff would not be prejudiced by intervention. (Plaintiff's Response, 5.)

Leaving aside plaintiff's claim that she would be prejudiced by not having exercised her discovery rights against movants, Plaintiff's Response, 4-5, plaintiff would suffer no prejudice from the "considerable delay and expense to which she would be subjected by an otherwise non-existent appeal." Id., at 5. She should have known that an appeal was a possibility when she filed the suit; having to defend a judgment on appeal is [6] not the kind of prejudice which will defeat post-judgment intervention for the purpose of appeal:

> "United argues that it was unfairly surprised when after having settled the case with all of the original and intervening plaintiffs it nonetheless faced an appeal .... The respondent's motion to intervene was filed less than three weeks after the "settlement" was incorporated in the District Court's final judgment, and necessarily concerned the same evidence, memories, and witnesses as the subject matter of the original class suit,' [citation omitted]. There is no reason to believe that in that short period of time United discarded evidence or was



> otherwise prejudiced."

McDonald, 432 U.S. 394, n.14. The whole purpose of post-judgment intervention for appeal is to allow appeals of decisions which would otherwise not occur.

D. Movants have legally-protected interests in their initiative. (Plaintiff's Response, 6-7.)

The assertion that movants, proponents of the initiative which placed Article XXVIII on the ballot have no interests in the continued vitality of the amendment, flies in the face of numerous cases holding that proponents of initiatives have legally-protectable interests in challenges to their political activities[5]. See, e.g., Continental Illinois National Bank and [7] Trust Co. of Chicago v. State of Washington, 696 F.2d 692 (9th Cir. 1983) (proponent of initiative allowed to intervene in utilities' challenge of initiative as violative of Contract Clause); Energy Fuels Nuclear, Inc. v. Coconino County, 766 P.2d 83, 159 Ariz. 210 (1988) (en banc) (proponents of initiative allowed to intervene)[6]. As the Supreme Court of California (en banc) noted recently: "Permitting intervention by the initiative proponents under these circumstances would serve to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." Building Industry Association of Southern California, Inc. v. City of Camarillo,

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[5]Unlike some other circuits, the Ninth Circuit does not require either satisfaction of the Article III standing requirements or a specific legal or equitable interest test. Portland Audubon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989); Sagebrush Rebellion v. Watt, 715 F.2d 525, 527-9 (9th Cir. 1983); County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980).

[6]See also, several cases cited in Movants' Memorandum supporting their Motion.

718 P.2d 68, 75, 226 Cal.Rptr. 81, 87 (1986) (en banc).

Plaintiff's reliance on Diamond v. Charles, 476 U.S. 54, 106 S. Ct. 1697 (1986) is misplaced. That case is inapposite on its face; the Supreme Court itself noted that Charles involved "the prosecutorial decisions of the Federal Government," Maine v.Taylor, 477 U.S. 131, 137, 106 S. Ct. 2440, 2446 (1986). This case does not involve criminal statutes, nor does it involve prosecutorial discretion of the Federal Government. This case involves proponents of an initiative who have spent hundreds of thousands of dollars and many months of work exercising their [8] political rights. These legally-protectable interests give rise to the kind of standing and rights which should require intervention.

E. The Governor's decision not to appeal prejudiced movants. (Plaintiff's Response, 9-10.)

Plaintiff's position that the Governor's failure to appeal did not prejudice movants because it was "considered," (Plaintiff's Response 10), and because movants could sue to enforce the now-declared unconstitutional amendment in state court (Plaintiff's Response 7-8), is ludicrous. The entire purpose of post-judgment intervention is to appeal decisions which affect non-parties. Here, the Governor's decision not to appeal triggered significant rights in movants: "The failure of the Zoning Commission to take an appeal clearly indicates that its representation of the interest of the interveners (sic] was inadequate ... At least one of the rights that cannot be protected without intervention is the right of appeal." Wolpe v. Poretsky, 144 F.2d 505, 507-8 (D.C. Cir.), cert. denied, 323 U.S. 777 (1944).

In addition, plaintiff's "adequate representation"



argument would fail in light of Governor Mofford's nationally-publicized opposition to Article XXVIII. There is no requirement that movants demonstrate that the State's representation of their interests actually is inadequate. The Supreme Court and the Ninth Circuit make plain that "[tlhe requirement of the Rule is satisfied if the applicant shows that representation of his [9] interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Legal Aid Society of Alameda Co. v. Dunlop, 618 F.2d 48, 50 (9th Cir. 1980), citing Trbovich v. United Mine Workers, 404 U.S. 528, 538-9 & n.20, 92 S. Ct. 630, 636, n.10. (1972). Plaintiff did not trust the State and its highest official to protect her interests even though the Governor publicly supported plaintiff's position. Her doubts about the adequacy of such representation resulted in this action. Yet, plaintiff now asserts movants should be content to trust such representation of their interests. The Governor's refusal to appeal the Court's decision is specific evidence movants cannot entrust their interests to such representation. The Trbovich standard of doubt as to the adequacy of such protection of movants' interests is more than satisfied and intervention is appropriate.

Nor would any reasonable person try to get a state court to override a federal court's determination that its state constitution violated the U.S. Constitution. "Although the Court's ruling would not bind the applicants absent their participation, any future action they may initiate would labor under the oppressive weight of an adverse precedent on the same facts. The mere prospect of an undesired precedent has been identified as a practical impairment." Usery v. Brandel, 87 F.R.D. 670 (W.D. Mich. 1980), citing Natural Resources Defense Council v. United States Nuclear Regulatory Cmmsn, [10] 589 F.2d 1341, 1345 (10th Cir. 1978); Francis v. Chamber of Commerce of the U.S., 481 F.2d 192, 195 n.8 (4th Cir.

1973).

## III. CONCLUSION

Plaintiff has not identified any obstacle to post-judgment intervention. The Federal Rules of Civil Procedure, the Supreme Court and the Ninth Circuit all recognize that post-judgment intervention is appropriate in circumstances where a movant's interest would otherwise be impaired and representation (measured by a "minimal" standard) would be inadequate. This is such a case. The Court should allow intervention by movants.

Respectfully submitted this 12th day of March, 1990.

GUST, ROSENFELD & HENDERSON
By James F. Henderson
Attorneys for Arizonans for Official English Committee
And Robert D. Park



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

MARIA-KELLY F. YNIGUEZ, et al.,
Plaintiff,
vs.
STATE OF ARIZONA, et al.,
Defendant.

No. CIV-88-1854-PHX-PGR
Phoenix, Arizona
March 26, 1990
2:01 P.M.

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

MOTION TO INTERVENE
MOTION TO ALTER OR AMEND JUDGMENT

APPEARANCES:
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* * * * *

[21]
THE COURT: Thank you, Counsel.

Let's hear now the Committee's and Mr. Parks' motions to intervene.

BY MR. HENDERSON:

Thank you, Your Honor.

* * * * *

The decision of this Court voids the political speech and the political interests of both the Committee and of Mr. Parks. For each of those reasons, Mr. Parks is chairman and individually involved himself in several months of work to get this initiative on the ballot.

They had 1,000 volunteers working on this. 200,000 petition signatures and 9700-some Arizonans made contributions [22] for the benefit, and some $307,000 was expended to put on this campaign.

The money issue is not the main issue, however. It is the fact that the franchise of 580,000 other voters in addition to Mr. Parks is affected and has been invalidated by this Court's opinion.

Now the question of, do advocates of initiatives have a right to intervene, and particularly at this point. I point out to the Court that we have two very specific opinions in the 9th



Circuit Court of Appeals, one in Sagebrush Rebellion v. Watt, and the other in Washington State Building & Construction Trades Council v. Spellman, 1982 and a 1983 case which specifically recognize the right of initiative advocates to intervene in these actions at this point.

The next issue that we must address is the one of timeliness. Counsel has said --

THE COURT:

Let me interrupt first on a procedure question.

MR. HENDERSON:

Certainly.

THE COURT:

Rule 24 specifically requires, in addition to the motion, a pleading of type, an answer or complaint, whatever form it may take, to fully set forth for the benefit of the Court and the opposition the nature of its right to intervene.

Has there been any such pleading filed in support of [23] the motion?

MR. HENDERSON:

Only to the extent of setting forth in a memorandum, Your Honor, attached to the motion and to the particular form of the notice of appeal which we have attached that indicated we would file if permitted to intervene.

THE COURT:

It says the motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim for the defense for which intervention is sought.

MR. HENDERSON:

We believed, Your Honor, that the memorandum attached to and supporting the motion did both of those things.

THE COURT:

I see.

MR. HENDERSON:

Then to the question of timeliness. The plaintiff has

complained here that by our not coming in and attempting to intervene earlier, that they were deprived of discovery opportunity relative to us.

This, I think, is a nonexistent situation, because the name of Robert Park has been mentioned during the course of these proceedings. Plaintiff Gutierrez mentioned it, although he had his first name wrong, in his testimony on the witness stand. They knew Mr. Park existed and he was available for any discovery.

However, that becomes wholly irrelevant for the simple reason that there was no real discovery per se, and the counsel for the attorney general indicated in his pleadings that [24] actually the facts were stipulated facts here.

But setting that aside, we did not earlier attempt to intervene here for the simple reason we believed the interests of these voters were sufficiently protected by the advent of the attorney general and the governor in this state.

And as the United States Supreme Court has said in the United Airlines vs. McDonald case, at Page 2470 of the Supreme Court Reporter, Number 97:

> "Intervention at that time would only have made the respondent a superfluous spectator in litigation for nearly three years, less time here, of course, for the denial of class certification was not appealable until after final judgment.
>
> "Moreover, such a rule would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination."

And in this instance, we believed that was actually the situation, since we have come to question whether we've -our interests were adequately represented here.

Now, again, from the United Airlines vs. McDonald



case, the Supreme Court has indicated that a post-judgment motion is appropriate for us to seek intervention on. And from the very same page of the Supreme Court Reporter, they allude [25] to the case in the 9th Circuit of Pellegrino vs. Nesbit, noting its similarity.

And there there was a corporation which had filed an action against the corporate officers to recover short swing profits, and the district court entered into judgment for the defendants. And when the corporation failed to appeal, a shareholder sought intervention for that purpose. And the Court of Appeals reversed the district court which refused it, ruling the motion was timely and that post-judgment intervention for the purpose of appeal was timely even in litigation that is not representative in nature, and in which the intervenor might therefore be thought to have a less direct interest in participation in the appellate phase.

We suggest to the Court that we do not have a lesser interest in the appellate phase in this particular instance.

THE COURT:

Let me ask you a question about being representative in nature now. What kind of an organization is the Committee?

MR. HENDERSON:

The Committee was a, in effect, a political action committee which was instituted for the purpose of circulating petitions to get this initiative on the ballot.

THE COURT:

Unincorporated association, is it that?

MR. HENDERSON:

Yes. Actually, Your Honor --

* * * * * * * * *

[32]

MR. HENDERSON:

The Attorney General representing the state and the Governor at the February hearing before this Court mentioned

at one point, as we read that transcript, that he wanted to talk about the First Amendment. But then the discussion got off on another aspect and it never did get back to the First Amendment consideration.

THE COURT:

And how would you raise this issue with the 9th Circuit Court of Appeals if permitted to intervene?

MR. HENDERSON:

I would tell the 9th Circuit Court of Appeals that the First Amendment is a content interested amendment. It is interested in giving people the ability to say what they think, what they feel, what they believe. It does not prohibit them giving it in, let's say in a New England accent or a southern accent, or any particular dialect, or German or Japanese or Spanish, or any other language. It says you have the right to speak your mind and say what you think. It's what you say, not how you say it.

We feel that is a very, very strong and important point in this instance.

THE COURT:

And you feel that was not presented to this Court?

MR. HENDERSON:

What -- what -- from what I have been able to see, the record, Your Honor, and the pleadings, I do not feel it was presented to the extent that it could and should have been.

[33]

I would suggest there was one other aspect that I do not think was fully presented to this Court which could have been, and that is the fact that no court that we could find has ever held that the First Amendment protects an on-the-job choice of language to use.

There are two cases in the 5th Circuit Court of Appeals which indicate that this is the case. One is a truck driver who was required to speak English on the job, and another was a



finding by that court which said that an English-on-the-job rule, only, did not discriminate on the basis of national origin as applied to a bilingual employee.

And probably most important is the Jurado vs. 1150 Corporation, 9th Circuit Court of Appeals 1987 case. That case involved Juarado, a disc jockey, who was forbidden to use Spanish in his broadcast.

THE COURT:

But I have to interrupt you here, because I don't know of anyplace in this Court's opinion that said that anyone could use any language that he or she chose in the performance of their jobs.

MR. HENDERSON:

No, I agree, Your Honor. I think that is absolutely correct.

However, that is the point, also. And the point is simply that requiring this woman and any other employee of the State of Arizona to perform official acts in the English language is not discriminatory on the basis of origin or any

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[44]

MR. HENDERSON:

I think the appealable interest is simply that Robert Park, an individual intervenor as well as chairman of the committee, has had his vote denigrated and voided. 580,000 others in this state have done likewise. There has been a lot of timely effort.

And we balance this, if I may, Your Honor, against -

THE COURT: So we --

MR. HENDERSON:

-- the plaintiff against this case, who has said, I have not been forced by my supervisor, I have not been forced by the attorney general, I have not been forced by the governor of the State of Arizona to do anything. But up here, I'm worried, I'm

concerned, I'm afraid that maybe if I speak Spanish at all while I'm working between eight and five or whatever hours we work, I am violating the constitution.

And yet, on the other side of the fence, we have the franchise rights of voters which not only have been threatened, they have been done away with by your decision which has said that particular provision of our constitution is void.

Now, I have a lot of respect for a legislature. Some people say maybe I shouldn't, but I think it's much more important for the constitutional provision than it is a statute. And I think the importance of the constitutional aspect all by itself, as well as doing away with the right of those voters to have their votes counted, observed and [45] respected, mandates that we be permitted to intervene for this appellate purpose.

We contemplate taking no further testimony whatsoever that would have any effect on anything that's gone before. We live with what's before this Court thus far. And we believe that it's a matter of interpretation and that that interpretation is contrary to what this Court has found.

THE COURT:

Thank you, Counsel.

MR. HENDERSON:

Thank you, Your Honor.

* * * * * * * *

[46]

MR. CHING:

Third, in terms of the releases signed by Miss Yniguez, we never said that it's okay for her to sign the releases.

* * * * * * *

[47]

THE COURT: Thank you, Counsel.

Before the Court are several matters, and by way of



introductory remark the Court would simply state that the appellate process is the trial court's security blanket. The court sits by itself and makes its rulings, with the great comfort of knowing that there can be an appeal procedure, there is an appeal procedure whereby at least a panel of judges, if not more, can review in hindsight the rulings made by the court and thereby insure that the lower court's position was not in error.

Sometimes we believe that those decisions are rendered and we were not in error to begin with. Nevertheless, the comforting nature of the process is such that we simply accept those appellate decisions and move on down the road. So, we make our rulings in contemplation that they will be reviewed.

I guess if this Court had a personal preference it would be that, indeed, this matter be appealed. But it's not a decision that this Court simply has discretion to permit after taking what the Court believes was a very careful and scrutinizing view of Article 28, in analyzing both the claims of the plaintiffs and the positions of the respective defendants, and applying all the rules of constitutional law that were presented to it, and concluding in a rather restrictive nature that the amendment was unconstitutional.

That obligation and duty pertains to the motions to [48] alter or amend as well as to the motions to intervene. So, they have to be analyzed separately.

Dealing first with the motion to alter or amend the judgment. And while I will be making these rulings orally from the court, I will tell you now that there will be a formal memorandum and order prepared so that you will have a full understanding of the Court's position on the various motions.

But I want to give you a brief idea of the Court's rationale here this afternoon as to the motion to alter or amend the judgment. And in view of the Booksellers case, cited by the attorney general, it appears to the Court that certifications at this stage would simply only compound a very difficult

situation.

The Court has determined in consideration of the abstention issue, and quite frankly I wish we had had the certification issue presented more fully. We did consider it in the analysis of the motions, and quite frankly, simply overlooked it in our memorandum and order. But, basically we've discussed and addressed this issue when we discussed the abstention issue.

We have determined in the opinion that the statute was not obviously susceptible to a limiting instruction and on that basis, abstained.

If we certified the question in the face of that finding, we would simply be saying to the Arizona Supreme [49] Court, why don't you take another look at this amendment, and would you like to rewrite it in view of this Court's decision on the First Amendment issue and report back to us. That's -that's a poor choice of words, but that's, in effect, what we would be asking them to do. And that is not an appropriate act for a district court to undertake.

As far as Attorney General Corbin's motion to intervene, it is quite clear that the reference statute, 28-2403(b), does not pertain to the situation here. That statute is intended to address those situations where private litigations, private litigators, or perhaps some remote state agency or officer is involved, or particularly where none is involved at all, and yet has been brought into question the constitutionality of the statute of the state.

By no stretch of the imagination can we conclude that Governor Mofford is not a party to the litigation, albeit she has apparently expressed a disinterest in appealing. The attorney general was party to the lawsuit until he was dismissed on his own motion.

That statute, 28 USC 2403(b), does not give this Court the authority to permit intervention. Should the Court simply



construe that as a matter of spirit and purpose so that we could get this matter appealed, I just don't believe that that would be a fair interpretation of the law as it pertains to intervention by a party who has successfully been dismissed [50] from the litigation.

If there are other grounds which the attorney general suggests would permit review by the appellate courts of a motion to intervene based on the interest of justice, and other authority, then that's a matter that the attorney general should argue to the 9th Circuit. I don't believe that that court has the power and authority to permit intervention under 2403(b), or under the state statute, Arizona Section 41-193(a)(3), to intervene in this action at this time.

The analysis as it pertains to the Committee and Mr. Parks is more difficult. First of all, there are two rules that apply. We have intervention of right as provided by Rule 24(a), and intervention by permission, permissive intervention as governed by Rule 24(b).

The law is quite particular as to intervention. We have the procedural defects that the Court mentioned. One, that the statute -- the rule specifically requires accompanying pleading setting forth the claim or defense for which intervention is sought. That isn't in the case, but I'm not too concerned with it, based on the representation that the moving papers themselves may set forth the claim or the defense for which intervention is sought. Procedurally I think it's defective. I don't think it's, perhaps, fatally defective.

And now we're dealing with the procedure irregularity as far as the Committee is concerned. Does this committee have [51]capacity to intervene in this lawsuit? The closest that we can conclude, based on the representations of counsel, is that it's an unincorporated association. There is no state statute which allows it to be a litigant. There's some law which permits unincorporated associations to be -- to sue or be sued.

If there is some substantive right existing under the constitution or laws of the United States, it's not clear how this provision should be applied to this type of situation. Except that it's representing that the federal substantive right is based on notions of federalism, I don't know that there's any legal authority for the Committee to intervene.

Putting that aside, and presuming for the moment that it does have capacity to intervene, we then have to look at the 9th Circuit tests on intervention. And the first test is, as counsel points out, is timeliness.

Insofar as this being a post-judgment motion for intervention, and insofar as the motion to intervene was made as soon as it was determined that Governor Mofford was not interested in appealing the Court's decision, the Court must conclude that it is timely.

That's somewhat questionable because, as the plaintiffs point out, had the motion to intervene been made earlier, and had it been granted, then perhaps discovery could have raised or disclosed factual matters which would then have brought into play the equal protection arguments which the [52] Court avoided in the rendering of its opinion, but which may have been more apparent and would have warranted the Court's attention if the parties had moved to intervene earlier in the litigation.

There is a flip side of that, and that is that a motion to intervene, as the intervenors point out, probably would not have been granted because of the fact that it did appear, probably would appear that early on that there was adequacy of representation of interests which were being protected, which would have forclosed their right to intervene earlier on. We'll never know that because the motion was not broader here.

Another critical test that is placed upon this Court's determination concerning intervention is whether or not the Committee and Mr. Parks have standing or the interest



necessary for intervention.

This gets complicated in the analysis because there is an interest requirement that is a different one from the appealable interest requirement which we are confronted with based on the status of the record at this stage, the judgment having been entered and this being a post-judgment motion for intervention.

An amorphous quality here. What is -- what is standing? What is the appealable interest? What is the intervention interest? It must be more than simply a matter of [53] great concern.

We have a substantial body of law which deals with legal or equitable interest which is placed in jeopardy. There has to be an injury. There has to be some showing that intervention is a matter of right, so that the interests of the parties seeking to come in can have their rights formally determined.

There are tests that apply to that particular finding requirement. An organization can obtain standing in two ways. By showing concrete injury to itself, its organization's welfare or interests, or in an associational capacity, even if it has not been directly injured, if its members would otherwise have standing in their own right. A critical test.

And two, if the interests of the organization, the interests which the organization seeks to protect are germane.

Three, that neither the action nor the relief sought required participation by the individual member or members.

So, when we get through the analysis to that stage, we can conclude that the interest doesn't arise simply because the intervenors have some type of a binding interest in the litigation.

Mr. Parks' interest now separated from the Committee's interest cannot be based simply on the fact that his vote has now been nullified. That's not what the Baker v. Carr cases hold. They deal with the dilution of the franchise, not with [54]

the abolition of the franchise.

So that the mere fact that Mr. Parks believes that he is protecting the interests of the many people who voted in support of the constitutional amendment does not in and of itself warrant intervention. The 9th Circuit has said that mere interest in establishment of a legal precedent is not sufficient to create an appealable interest. No one has an absolute constitutional right to appeal.

If the Committee has any type of standing in this case, it must be based on the injury to its own interest. And it's very difficult to see how the injury is directed toward the Committee itself. The fact that its efforts and the money that it expended is now apparently wasted is not sufficient by itself to confer standing.

The Sagebrush Rebellion case does say that public interest groups should be granted an intervention of right to challenge the legality of government actions. Even that is pointed out in the dissent must bear some relationship to standing to appeal. If that were not so then in any litigation public interest groups would be permitted to intervene.

There must be a significantly protectable interest, and that significantly protectable interest doesn't automatically apply to every voter. The fact that the case may rest at this stage, not be appealed, is not grounds for intervention.

[55]

The test, 9th Circuit test then moves into the impairment of interest. As long as the case rests in its present posture, there is no impairment of interest. It's simply brought in any court in this state, by any private citizen who seeks to have an interpretation determining that somebody has violated the provisions of Article 28.

It's this ground that troubles this Court more than any. As I indicated, the matter should be appealed. It would be helpful to have precedential status one way or another obtained



by this decision. But, it's not in the Court's power to simply determine that appeal is in everyone's best interest.

There's a slight difference in the analysis as it pertains to Rule 24(b), but basically it comes down to the same lack of standing that the Court believes prohibits intervention as matter of right.

As I indicated, we will prepare a formal memorandum and order which will be the basis for your appeal from this Court's decision. It's quite obvious that there will be an appeal. It's quite obvious that there should be an appeal. But now the appeal must be from the Court's denial of the motion to alter or amend the judgment and from the Court's denial of the motions to intervene.

The Court still has its security blanket in the form of the 9th Circuit. If they believe that you should be permitted to intervene, then they certainly can do that.

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

130 F.R.D. 410

**Maria-Kelly F. YNIGUEZ and Jaime P. Gutierrez, Plaintiffs,**

**v.**

**Rose MOFFORD, individually and as Governor of the State of Arizona, Robert K. Corbin, individually and as Attorney General of the State of Arizona, and Catherine Eden, individually and as Director of the Department of Administration of the State of Arizona, Defendants.**

**No. CIV 88-1854 PHX PGR.**

United States District Court,

D. Arizona.

April 3, 1990.

***411** Robert J. Pohlman, Phoenix, Ariz., for plaintiffs.

Anthony B. Ching, Sol. Gen., Phoenix, Ariz., for defendants.

MEMORANDUM OPINION AND ORDER

ROSENBLATT, District Judge.

On February 6, 1990, the court declared that Article XXVIII of the Arizona Constitution, ***412** entitled "English as the Official Language", was unconstitutional on its face in violation of the First Amendment of the United States Constitution, 730 F.Supp. 309. Because Governor Rose Mofford, the sole remaining defendant, has stated that she has no intention of appealing that ruling, two post-judgment motions to intervene are pending before the court: the State of Arizona ex rel. Attorney General Robert K. Corbin's Motion to Intervene, filed March 2, 1990, and the Arizonans for Official English Committee and Robert D. Park's Motion to Intervene, filed February 15, 1990. Also pending is



defendant Corbin's Motion to Alter or Amend Judgment, filed February 16, 1990. For the reasons set forth herein, as supplemented by the reasons stated by the court during its bench ruling on these motions on March 26, 1990, all three motions will be denied.

MOTION TO ALTER OR AMEND JUDGMENT

Defendant Corbin, in a timely manner, has requested pursuant to Fed.R.Civ.P. 59(e) that the judgment entered in this action be altered or amended because the court's memorandum opinion and order failed to dispose of the defendants' request that the state law question be certified to the Arizona Supreme Court. Assuming, without deciding, that Corbin has standing to bring this motion in light of his dismissal as a party defendant, the court finds that such a certification would be inappropriate.

The court initially notes that neither the defendants' Motion to Supplement Argument, in which the certification issue was raised in one conclusory paragraph, nor Corbin's instant motion specifies what the "state law question" is that should be certified. In light of Corbin's reply memorandum in support of the instant motion, the court construes the motion as requesting that the court certify to the Arizona Supreme Court the question of whether the narrow interpretation of Article XXVIII proffered by Corbin in Attorney General Opinion I 89-009 is a valid construction of the Article.

While Corbin is correct that the court's opinion did not specifically resolve the certification issue, an inadvertence on the court's part, the conclusion that the certification request must be denied is implicit in court's reasoning underlying its denial of the defendants' request that the court abstain from deciding the constitutionality of Article XXVIII. Given this court's conclusion that Article XXVIII is not obviously susceptible of a construction that

would eliminate its unconstitutional overbreadth, any certification of the validity of the proffered narrowing construction would be improper inasmuch as it would be "ask[ing] a state court if it would care in effect to rewrite a statute." *City of Houston, Texas v. Hill*, 482 U.S. 451, 471, 107 S.Ct. 2502, 2515, 96 L.Ed.2d 398 (1987).

The Court is unpersuaded by Corbin's assertion that *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988), requires certification given the Supreme Court's acknowledgement in that case that its decision to certify a narrowing construction of the state statute proffered by the state attorney general, rather than deciding itself whether the state statute was readily susceptible of the attorney general's interpretation, was due to the unusual factual and procedural circumstances of that case. The unique situation which led to certification in *American Booksellers* is not present here and under the circumstances of the instant case, certification would entail both disadvantage and cost since it would only unnecessarily prolong the limbo of uncertainty that Article XXVIII created for those adversely affected by its chilling effect.[1]

***413** CORBIN'S MOTION TO INTERVENE

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[1] The fact that this court's opinion declaring Article XXVIII facially unconstitutional was not issued for more than nine months after submission does not indicate, as Corbin asserts, that there was no urgency in this case. If the delay in ruling indicates anything, it is how overtaxed the court's limited resources have become by its ever increasing caseload. Had the court had the luxury of the resources that the parties committed to this action, such as the eight attorneys and almost 800 hours of work that the plaintiffs submit they put into the prosecution of this action, the court would have ruled in the expedited manner that this type of case deserves.



Corbin, on behalf of the State of Arizona, has moved to intervene as a defendant in this action so that he may participate in all post-judgment proceedings, including an appeal. Both Corbin and the State were named defendants in this action and both filed motions to dismiss which the court subsequently granted. Corbin's assertion that he now has standing to intervene on the State's behalf is premised solely on 28 U.S.C. § 2403(b), which provides in part that when the constitutionality of a state statute is drawn into question the court shall certify that fact to the state attorney general and shall permit the state to intervene to present evidence, if appropriate, and to argue the constitutionality of the statute.

The court has no authority to permit Corbin to intervene under § 2403(b) because that statute authorizes intervention by a state attorney general only in actions "to which the State or any agency, officer, or employee thereof is not a party". *Sovereign News Co. v. Falke*, 448 F.Supp. 306, 314 n. 13 (N.D.Ohio 1977), *remanded on other grds sub nom. Sovereign News Co. v. Corrigan*, 610 F.2d 428 (6th Cir.1979). It is undisputed that Governor Mofford is still a party defendant herein, and that the state, Corbin and Department of Administration Director Eden were formerly party defendants. It is further undisputed that Corbin, on behalf of himself and the other defendants, has already been allowed to present evidence and argue the constitutionality of Article XXVIII.

The court is aware of nothing in the legislative history of § 2403(b), and Corbin cites to none, that would require it to ignore the statute's plain language under the circumstances of the instant case. A denial of Corbin's request to intervene in no way ignores § 2403(b)'s spirit and purpose of ensuring that a state has the opportunity to defend the constitutionality of its laws. That opportunity is present in this case and if it is not further exercised, it is only

because Governor Mofford determines that the state's sovereign interests would be best served by foregoing an appeal.

OFFICIAL ENGLISH COMMITTEE & PARK'S MOTION TO INTERVENE

The Arizonans for Official English Committee ("Committee"), the main proponent of the initiative that placed Article XXVIII on the ballot, and Robert D. Park, individually and as chairman of the Committee, have moved to intervene in this action for the purpose of taking an appeal. They seek intervention both as of right and permissively, pursuant to Fed.R.Civ.P. 24.

The court initially notes that the Committee and Park have failed to comply with Fed.R.Civ.P. 24(c)'s requirement that their motion to intervene be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The proposed notice of appeal submitted as an attachment to the intervention motion does not satisfy Rule 24(c)'s requirement. Without condoning the procedural defect, and notwithstanding that even in post-judgment intervention cases it has been held that the failure to file the requisite separate pleading is fatally defective to a motion to intervene, *see e.g. Lebrecht v. O'Hagan*, 96 Ariz. 288, 394 P.2d 216 (1964) (construing an identical Ariz.R.Civ.P. 24(c)); *Hobson v. Hansen*, 44 F.R.D. 18 (D.D.C.1968); *Usery v. Bd. of Public Education*, 418 F.Supp. 1037 (W.D.Pa.1976), the court believes that the importance of this issue demands that it resolve the merits of the motion to intervene.

In order to be able to intervene the Committee must first have the legal capacity to be a participant in this litigation. Inasmuch as the Committee has stated that it is an unincorporated association without capacity to sue or be sued in its common name under Arizona law, its capacity to



intervene is dependent upon it coming within the purview of Fed.R.Civ.P. 17(b)(1)'s exception that an unincorporated association "may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." The Committee's contention that it has "representational capacity" is misdirected because while an unincorporated association's representation of its members ***414** may give it standing to intervene, it does not give it the legal capacity to intervene. The court will assume for the purpose of the instant motion that Rule 17(b)(1) has been satisfied here because the underlying action involves a substantive constitutional right.

Although post-judgment motions to intervene are generally disfavored, see 7C C. Wright, A. Miller, & M. Kane, *Federal Practice at Procedure: Civil* 2d § 1916 at 444-45 (1986), post-judgment intervention for purposes of appeal may be appropriate if certain requirements are met, the first of which is that the intervenors must act promptly after entry of judgment. *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1328 (9th Cir.1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980). Since the Committee and Park filed the instant motion nine days after the judgment was entered, which was well within the time period for filing a notice of appeal, the court finds that the motion to intervene is timely. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96, 97 S.Ct. 2464, 2470-71, 53 L.Ed.2d 423 (1977).

The second requirement is that the intervenors must meet traditional standing criteria. *Legal Aid Society of Alameda County*, 608 F.2d at 1328. Although the Committee and Park correctly assert that this circuit has adopted the general rule that a party seeking to intervene need not possess the standing necessary to initiate the

lawsuit, *United States v. Imperial Irrigation Dist.*, 559 F.2d 509, 521 (9th Cir.1977), *rev'd sub nom. and vacated on other grds, Bryant v. Yellen*, 447 U.S. 352, 100 S.Ct. 2232, 65 L.Ed.2d 184 (1980); *accord, Portland Audubon Society v. Hodel*, 866 F.2d 302, 308 n. 1 (9th Cir.), *cert. denied*, --- U.S. ----, 109 S.Ct. 3229, 106 L.Ed.2d 577 (1989), standing necessary to support an appealable interest must be present here given the purpose behind the Committee's and Park's desire to intervene, i.e. to prosecute an appeal because the named parties are either unwilling or unable to do so. *Imperial Irrigation Dist.*, 559 F.2d at 521; *Fisher v. Tucson School Dist. No. One*, 625 F.2d 834, 837 n. 1 (9th Cir.1980); *Legal Aid Society of Alameda County*, 608 F.2d at 1328 n. 9. The court concludes that none of the interests that the Committee and Park assert they possess in this action are sufficient to grant them standing to intervene, whether as of right or permissively, for purposes of taking an appeal; furthermore, none of those interests is sufficient to amount to the apparently lesser "significantly protectable interest" required by Fed.R.Civ.P. 24(a)(2), *Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971), an interest that in this circuit need not be a specific legal or equitable interest as long as it is a protectable interest in the outcome of the litigation of sufficient magnitude to warrant inclusion in the action. *Smith v. Pangilinan*, 651 F.2d 1320, 1324 (9th Cir.1981).

An unincorporated association, such as the Committee, may have standing in its own right if it seeks judicial relief from an injury to itself or to vindicate its own rights. *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975). The only particularized injury allegedly suffered by the Committee is that the court's declaration of Article XXVIII's unconstitutionality has rendered "for naught" the substantial labors and resources it



committed to the promotion of the initiative that was enacted as Article XXVIII. Even assuming that the court's decision nullified the Committee's efforts, although no such nullification has actually occurred, the court does not believe such an impairment to the Committee's institutional interests is sufficient to meet either Article III's fundamental injury-in-fact requirement or Rule 24(a)(2)'s interest requirement.

The court realizes that the Ninth Circuit Court of Appeals has allowed public interest groups, such as initiative proponents, to intervene in actions to defend the product of the groups' efforts. *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir.1983); *Washington State Bldg. & Const. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir.1982), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 ***415** (1983); *State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir.1980). The court does not consider these cases dispositive of the instant circumstances because the opinions are, unfortunately, all lacking in any illuminating legal analysis on the issue of intervention and, more importantly, do not involve post-judgment intervention for the purpose of taking an appeal. Such an intervention is, as the Committee and Park point out, a "distinctly different situation" from the normal intervention, and one that requires a stronger showing of interest to justify intervention. See 7C C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil* 2d § 1916 at 444-45. The court does not believe under these circumstances that the mere fact that an organization is a proponent of an initiative proposition, and has an abstract concern that is affected by the adjudication, is sufficient to create the concrete injury necessary for non-representational organizational standing.

The Committee, even in the absence of a sufficient injury to itself, may still obtain associational or

representational standing, although the possibility of such standing does not eliminate or attenuate the case or controversy requirement of Article III. *Warth v. Seldin*, 422 U.S. at 511, 95 S.Ct. at 2211. One of the requirements for such standing, and the only one at issue here, is that the members of the organization must otherwise have standing in their own right. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). Although the standing of a single member is sufficient to meet this requirement, *E.E.O.C. v. Nevada Resort Ass'n*, 792 F.2d 882, 885 (9th Cir.1986), the Committee has not established that any of its members would have the standing necessary to have an appealable interest in this action. To the extent that the Committee, and/or Park, are attempting to represent non-members who voted in favor of the proposition, they may not do so under the prudential limitations on standing. *See Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979).

The only one of its members identified by the Committee is Park, its chairman. The Committee and Park allege that he has a sufficient interest because the court's decision herein nullified his vote in favor of Article XXVIII. While there is a concept referred to as "voter standing" that has arisen in malapportionment cases, *see e.g., Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) and its progeny, wherein the Supreme Court has found that disadvantaged voters had a sufficient particularized and objectively ascertainable injury in fact to confer standing because their votes had been diluted relative to the vote of other citizens of the same state, *In re United States Catholic Conference*, 885 F.2d 1020, 1028 (2d Cir.1989), such is not the case here. Even assuming that Park's vote has been "nullified", and it has not, his constitutional right to vote has



not been impaired or diminished by the court's action. While the fact that Park voted in favor of the proposition that enacted Article XXVIII may constitute an interest, it is too remote and general to constitute a significantly protectable interest for purposes of Rule 24(a)(2). *Fox Valley Reproductive Health Care Center v. Arft*, 82 F.R.D. 181, 182 (E.D.Wis.1979).

Furthermore, none of the reasons cited by the Committee and Park in support of their request to intervene permissively pursuant to Rule 24(b)(2) constitute grounds for finding that they have standing to appeal. For example, standing cannot be predicated upon a mere interest in the establishment of legal precedent, *United States v. Imperial Irrigation Dist.*, 559 F.2d at 521, nor on the fact that a conclusion that the Committee and Park do not have standing would perhaps leave no one willing and able to appeal. *See Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974); *In re U.S. Catholic Conference*, 885 F.2d at 1031.

Even assuming that the Committee and Park meet the threshold interest test for intervention as of right, which the court finds they do not, the possibility that the ***416** court's declaration of Article XXVIII's unconstitutionality could affect their interests is too tenuous to meet the impairment requirement of Rule 24(a)(2). *See In re Benny*, 791 F.2d 712, 721 (9th Cir.1986). While *stare decisis* may, in appropriate circumstances, supply the practical impairment required for intervention of right, *Smith v. Pangilinan*, 651 F.2d at 1325, the degree of *stare decisis* arising from this court's decision is insufficient to be a practical impairment because, inasmuch as it is not binding on the Arizona state courts, *see Moore v. Sims*, 442 U.S. 415, 428, 99 S.Ct. 2371, 2379-80, 60 L.Ed.2d 994 (1979), it does not foreclose any rights of the Committee or Park in any future state court

proceeding arising out of Article XXVIII. *Cf. Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir.1977). Consequently, there has been no "nullification" of any vote cast in favor of the Article and no disenfranchisement of any voter.

If the Committee and Park had the requisite impaired interest necessary for intervention, which they do not, they would meet the inadequate representation requirement of Rule 24(a)(2). Since a party seeking to intervene as of right need only meet the minimal burden of showing that the representation of his interest may be inadequate, *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972), Governor Mofford's stated intention not to appeal the court's decision indicates that the present defendants do not fully represent the interests of the Committee and Park. *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir.1980). The court notes, however, that the assertion by the Committee and Park that the representation of the defendants is inadequate because the defendants did not raise certain issues concerning Article XXVIII's constitutionality that the Committee and Park would raise on appeal militates against a finding that the motion to intervene was timely filed. If the Committee and Park had any such arguments, they should have moved to intervene prior to the court's decision declaring Article XXVIII unconstitutional so that appropriate discovery could have been taken and more complete legal arguments could have been presented to the court. Therefore,

IT IS ORDERED that Defendant Corbin's Motion to Alter or Amend Judgment (doc. # 82) is denied.

IT IS FURTHER ORDERED that the State of Arizona Ex Rel Attorney General Robert K. Corbin's Motion to Intervene (doc. # 92) is denied.

IT IS FURTHER ORDERED that the Arizonans for Official English Committee and Robert D. Park's Motion to



Intervene (doc. # 78) is denied.

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

[Initial Address Omitted]

[Caption Omitted]

No. CIV 88-1854 PHX PGR

## NOTICE OF APPEAL

Notice is hereby given that Arizonans for Official English and Robert D. Park hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the Memorandum Opinion and Order entered in this action on the 3rd day of April, 1990, which states:

> "IT IS FURTHER ORDERED that the Arizonans for Official English Committee and Robert D. Park's Motion to Intervene (doc. #78) is denied"

which referenced Motion to Intervene was sought for the purpose of filing an appeal from that part of the Memorandum Opinion and Order entered on the 6th day of February, 1990, which ordered:

> "--- that Article XXVIII of the Constitution of the State of Arizona is hereby declared to be void as being invalid on its face in violation of the First Amendment of the Constitution of the United States."

Dated this 9th day of April, 1990.

WILLIAMS & JENSEN, P.C.
1101 Connecticut Avenue, N.W.
Washington, DC 20036-0500



Barnaby W. Zall

GUST, ROSENFELD & HENDERSON
By James F. Henderson
Attorneys for Intervenor-Defendants
Arizonans for Official English
Committee and Robert D. Park

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

[Initial address omitted]

[Caption Omitted]

_____)

CIV. No. 88-1854 PHX PGR

**NOTICE OF APPEAL**

Notice is hereby given that Plaintiff Jaime P. Gutierrez hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment and Memorandum Opinion and Order entered in this action on the 6th day of February, 1990.

DATED this 20th day of April, 1990.

POHLMAN & SANDERS
A Professional Association
By: Robert J. Pohlman
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Phoenix, Arizona 85016
AND
Bonn & Jensen, Chartered
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Co-counsel for Plaintiffs



**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

No. 90-15546

[Caption Omitted]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
(NO. CIV 88-1854 PHX PGR)

**AFFIDAVIT OF CAMERON WHITMAN**

My name is Cameron Whitman. My business address is 818 Connecticut Avenue, Northwest, Suite 200, Washington, D.C. 20006. Unless I say otherwise, everything I say in this affidavit is said on the basis of my own personal knowledge.

(1) I am Field Director for U.S. ENGLISH, the largest organization promoting English as the official language of the United States and of the states. Since its formation in 1983, U.S. ENGLISH has actively promoted and supported the fourteen constitutional amendments and statutes declaring English the official languages of those states enacted during that period. U.S. ENGLISH is currently promoting statutes and constitutional amendments in the federal Congress and in several states.

(2) Among those proposals is a ballot referendum which will appear on the June 5, 1990 election ballot in Alabama and a legislative proposal in Missouri. I am familiar with those proposals and with the persons supporting and opposing those proposals.

(3) I am familiar with the February 6, 1990, March 26, 1990 and April 4, 1990 decisions in the lawsuit, *Yniguez v. Mofford*. I have read the written opinions, and have had them

and the oral opinion from March 26 described and explained to me by some of the lawyers involved in the lawsuit. In addition, I have read or had explained to me many of the most important legal decisions involving choice of language in the workplace, including the decisions on the Los Angeles bilingual radio d.j. [*Jurado v. 1150 Corp.*, 813 F.2d 1406 (9th Cir. 1987)] and the lumberyard and truck driver cases from Texas [*Garcia v. Gloor,* 618 F.2d 264 (5th Cir. 1980) and *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)].

(4) The effect of these decisions has been to slow, and in at least one case, halt, progress on similar legislative proposals in other states. I have received numerous questions about the decisions from legislators, persons who are promoting similar proposals, voters and media representatives. In virtually every case the legislators and proponents are confused and uncertain because of these decisions. In Missouri, for example, state Representative Franklin halted consideration of his statute because it was modeled on the Arizona constitutional provision struck down as unconstitutional by Judge Rosenblatt. In Alabama, where virtually all of the state's political leaders supported passage of the June referendum, I have had to discuss the decisions with dozens of interested persons, most of whom could not understand the court's rationale and hence could not understand how it might relate to them.

(5) In addition, the decisions of the District Court have created serious doubts about the legality of the official language statutes and constitutional provisions in the other sixteen states which have adopted English as the official language. A swift decision by this court could be the only way to remove the specter of unconstitutionality from those laws.

(6) I am quite experienced in explaining American jurisprudence and constitutional doctrines to laypersons who are not familiar with it. In addition to my work with state



legislators, I have extensive experience explaining American laws and political decisions to persons in other countries; before I joined U.S. ENGLISH, I served in American embassies in three countries, including, most recently, five years in Rome. Yet I find myself unable to explain adequately the judge's decisions in this case. I cannot explain how a law which has been declared unconstitutional can still be enforced in state courts. I cannot explain this new First Amendment right to choice of language on the job, nor can I reconcile this new right with the other court decisions I know about. In addition, I cannot explain why a decision striking down a part of the Arizona Constitution cannot be appealed. As a result, I am unable to help legislators and others understand these decisions so that they can avoid similar results in other states.

(7) I believe that rapid consideration by the U.S. Court of Appeals could avoid some of the chilling effect on legislators and political activists around the country. In particular, a decision that would allow an appeal of the District Court's opinion would, by itself, give legislators and political activists some hope that clarifications of their legal and constitutional duties might be forthcoming. In addition, a rapid decision on the merits of the case, either way, could help these legislators and political activists to avoid constitutional difficulties in the future.

I hereby swear under penalty of perjury that the foregoing is true, accurate and complete, to the best of my knowledge and ability.

Cameron Whitman

5 - 3, 1990

WITNESSETH, by my signature and seal below, that

the above-named affiant, Cameron Whitman, came before me, identified herself as such, swore under penalty of perjury that the information she provided in the above affidavit was true, accurate and complete, to the best of her knowledge and ability.

Notary Public

My Commission expires: 2-14-9?
DONE: This 3 day of May, 1990, in Birmingham, Alabama
Antitrust Bank



**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**
**DECISION GRANTING INTERVENTION**

939 F.2d 727

**Maria-Kelly F. YNIGUEZ; Jaime P. Gutierrez,**
**Plaintiffs,**
**v.**
**STATE OF ARIZONA, Defendant-Appellee.**
**Robert D. Parks; Arizonans for Official English,**
**Applicants in intervention-Appellants.**
**Maria-Kelly F. YNIGUEZ; Jaime P. Gutierrez,**
**Plaintiffs-Appellees,**
**v.**
**Rose MOFFORD, individually and as Governor of the State of Arizona; Robert Corbin, individually and as Attorney General of the State of Arizona,**
**Defendants-Appellants.**
**Robert D. Parks; Arizonans for Official English,**
**Applicants in intervention-Appellees.**
**Nos. 90-15546, 90-15581.**
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Dec. 14, 1990.
Decided July 19, 1991.

***728** Robert K. Corbin, Atty. Gen., Anthony B. Ching, Sol. Gen., Paula S. Bickett, Asst. Atty. Gen., Phoenix, Ariz., for state appellants.

Robert J. Pohlman, Pohlman & Sanders, Phoenix, Ariz., for plaintiffs- appellees.

***729** Barnaby W. Zall, Williams & Jensen, Washington, D.C., for the appellant, movants & intervenors.

James F. Henderson, Gust, Rosenfeld & Henderson,

Phoenix, Ariz., for the appellants, movants, intervenors.

Appeal from the United States District Court for the District of Arizona.

Before TANG, FLETCHER and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

This case presents two novel questions concerning post-judgment intervention: first, whether the sponsors of a ballot initiative may intervene after judgment to appeal a decision holding the ballot initiative unconstitutional when the only defendant in the case chooses not to appeal; and second, whether the Attorney General, having argued for and won a dismissal of the suit against him in the district court, may intervene on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Arizonans for Official English ("AOE") and its spokesman Robert D. Park campaigned for adoption by ballot initiative of an amendment to the Arizona Constitution entitled "English as the Official Language." In the November 1988 general election, the Arizona voters approved the new constitutional provision. That new provision, Article XXVIII of the Arizona Constitution ("Article XXVIII") provides in part: English shall be the official language of the State of Arizona and all of its political subdivisions, that the Article is applicable to all branches of government and to all government officials and employees during the performance of government business, that the state and its political subdivisions shall take all reasonable steps to preserve, protect and enhance the role of English as the state's official language, that the state and its political subdivisions ... shall act only in English.... Section Four of Article XXVIII states that "[a] person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The



Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection." The Arizona legislature has not enacted any limitations on private lawsuits to enforce Article XXVIII.

Maria-Kelly Yniguez, an employee of the Arizona Department of Administration, ceased speaking Spanish while performing her official state duties immediately upon passage of Article XXVIII. She feared that under Article XXVIII she was vulnerable to discipline by her state employer if she were to continue to speak Spanish on the job. In November 1988 Yniguez sued (in a series of amended complaints) the State of Arizona, Governor Rose Mofford, Arizona Attorney General Robert Corbin, and Director of the Arizona Department of Administration Catherine Eden in federal district court. Yniguez sought an injunction against state enforcement of Article XXVIII and a declaration that it violates the first and fourteenth amendments of the United States Constitution.

The state defendants all moved for dismissal, arguing that the eleventh amendment barred Yniguez's suit and that there was no live "case or controversy," U.S. Const. Art. III, between Yniguez and any of the defendants. All of the state defendants were represented by the Attorney General's office. The district court then proceeded to issue a series of thoughtful and carefully reasoned rulings, most of which are not now before us.

On February 6, 1990, the district court dismissed all defendants from the suit except the Governor. The court held that the eleventh amendment bars suit against Arizona. The court further held that the Attorney General is an improper party under the doctrine of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), because he has no authority to enforce Article XXVIII against Yniguez. Therefore, the court held that the eleventh amendment also

bars Yniguez's suit against the *730 Attorney General. Although the district court found that Eden has authority to enforce Article XXVIII, she had not threatened to do so, and thus the court held that no case or controversy was ripe for adjudication as to her. The district court therefore dismissed Eden from the suit as well. Finally, the district court held that the Governor has the authority to enforce Article XXVIII against Yniguez and had sufficiently threatened to do so for Yniguez to sue her under *Ex parte Young*.

Having dismissed all the defendants except the Governor, the district court proceeded on the same date, February 6, 1990, to rule on the merits of Yniguez's claim. The court held that Article XXVIII is facially unconstitutional under the first amendment. It therefore granted Yniguez declaratory relief, but denied injunctive relief because there was no enforcement action pending. Governor Mofford – who had publicly opposed the adoption of Article XXVIII during the 1988 election – immediately announced her decision not to appeal the district court's opinion and order.

On February 16, 1990, AOE and its spokesperson Park moved to intervene post-judgment for the purpose of pursuing an appeal of the district court's order. They sought to intervene both as of right and permissively under Fed.R.Civ.P. 24. During arguments before the district court and this court, the attorneys for the Attorney General's office and for AOE and Park averred that AOE had inquired of the Attorney General at an early stage of the lawsuit whether he would vigorously defend the constitutionality of Article XXVIII, and that they had been assured that he would. Yniguez does not contend otherwise. On March 2, 1990, the Attorney General sought to intervene for the purpose of prosecuting the appeal pursuant to 28 U.S.C. § 2403(b).

On April 3, 1990, the district court denied both



motions to intervene. 130 F.R.D. 410. Although the court found that AOE's and Park's motion was timely, it denied it on two grounds. First, the court held that the prospective intervenors did not satisfy the Article III requirement of injury-in-fact necessary for there to be a justiciable controversy. In addition, the court denied the motion to intervene as of right on the ground that AOE and Park did not have an adequate interest in the litigation under Fed.R.Civ.P. 24(a)(2). The district court stated that its decision on the merits would not bind the Arizona courts, and therefore that AOE's and Park's ability to enforce Article XXVIII was not impaired by the decision.[1] The district court

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[1]In its written memorandum opinion and order denying the post-judgment intervention motion, the district court indicated that the reason its opinion on the merits would have no *stare decisis* effect in the Arizona courts was because the decision rested on an interpretation of state law. The district court cited *Moore v. Sims*, 442 U.S. 415, 428, 99 S.Ct. 2371, 2379, 60 L.Ed.2d 994 (1979) and *Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir.1977), both of which recite the familiar principle that state courts have the final word on the meaning of state law. A state court may avoid a federal court decision striking down a provision of state law by giving that provision an appropriate narrowing construction. All of this is unexceptional. However, during oral argument on the post-judgment intervention motion the district court expressed a more sweeping view on the power of state courts to ignore federal decisions not just about state law, but federal law. The district court suggested that even if the Arizona state courts were to interpret Article XXVIII exactly as the federal court had interpreted it, the Arizona courts would not be bound to follow the federal court decision that it is unconstitutional, because only decisions of the United States Supreme Court can bind the states on questions of federal law. We address this view below, *infra* at 737.

also denied the Attorney General's motion to intervene under 28 U.S.C. § 2403(b). Section 2403(b) authorizes intervention by a state attorney general in actions "to which [the] State or any agency, officer, or employee thereof is not a party." The district court noted that although the Governor had not appealed, she remained a party. Accordingly, the court concluded that section 2403(b) is not applicable. These timely appeals of the denial of the motions to intervene followed.

STANDARD OF REVIEW

We review the denial of a motion to intervene. *Waller v. Financial Corp. of America*, 828 F.2d 579, 582 (9th Cir.1987). The district court's determination ***731** of timeliness, however, is reviewed only for an abuse of discretion. *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir.1986), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987).

DISCUSSION

I. AOE and Park

AOE and Park contend that they have a right to intervene on appeal under Fed.R.Civ.P. 24(a) ("Intervention of Right"). Rule 24 of the Federal Rules of Civil Procedure confers a right to intervene "[u]pon timely application" when: the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Fed.R.Civ.P. 24(a)(2). In *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir.1983), we interpreted Rule 24(a) to require the granting of a motion to intervene at the outset of litigation if four criteria are met: (1) timeliness; (2) an interest in the subject matter of the litigation; (3) absent intervention the



party's interest may be practically impaired; (4) other parties inadequately represent the intervenor. *Id.* at 527.

In order for an individual to intervene in ongoing litigation between other parties, he need only meet the *Sagebrush Rebellion* criteria. However, where no party appeals, the "case or controversy" requirement of Article III also qualifies an applicant's right to intervene post-judgment. In *Legal Aid Soc'y. of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir.1979), cert. denied, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980), we restated the rule that "post-judgment intervention for purposes of appeal may be appropriate if the intervenors ... meet traditional standing criteria." *Id.* at 1328 (citations omitted). As the Supreme Court stated in *Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986), "[a]lthough intervenors are considered parties entitled, among other things, to seek review ... an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Id.* at 68, 106 S.Ct. at 1706 (citation omitted; emphasis added). This requirement assures the jurisdictional prerequisite of a live "case or controversy."

As we explained in *Brennan*, once the party defendants have "acquiesced in the judgment against them," as the Governor did here, applicants "must demonstrate such a stake in the outcome of an appeal that a live Article III case or controversy remains for appellate resolution." *Brennan*, 608 F.2d at 1328 n. 6. Therefore, an interest strong enough to permit intervention with parties at the onset of an action under Rule 24(a) is not necessarily a sufficient basis for intervention after judgment for the purpose of pursuing an appeal which all parties have abandoned. In *Brennan* we cited a commentator to illustrate this jurisdictional limitation:

A distinction between standing to intervene and to appeal makes particular sense when the "case or controversy" limitation on the federal judicial power is recalled. Adding C to the litigation between A and B may pose no problems under Article III of the Constitution, but permitting C to be the sole adversary of B on appeal, when his interest in the case may be only in its value as precedent, certainly does give difficulty since there is no real controversy between A and C. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv.L.Rev. 721, 753-54 (1968) (cited with approval in *Brennan*, 608 F.2d at 1328 n. 9). Hence, before assessing whether AOE and Park meet the *Sagebrush Rebellion* criteria, we must first decide whether permitting them to intervene on appeal would be consistent with the requirements of Article III.

A. Article III Standing

AOE and Park can meet the Article III "standing criteria by alleging a threat ***732** of particularized injury from the order they seek to reverse that would be avoided or redressed if their appeal succeeds." *Brennan*, 608 F.2d at 1328. AOE and Park contend, as they did in the district court, that they satisfy this test because, as the sponsors of Article XXVIII, they will be injured by its nullification. The district court held that this "abstract" interest is insufficiently concrete to satisfy Article III. Yniguez urges us to adopt the district court's reasoning, citing *Diamond v. Charles*.

In *Diamond*, a private physician had intervened at the trial level in an action to enjoin enforcement of an Illinois statute restricting the performance of abortions. After the Court of Appeals affirmed a permanent injunction against the enforcement of the statute, the state decided not to appeal. The private physician, claiming that he had an interest in seeing Illinois' laws enforced, attempted to appeal to the United States Supreme Court. The Court held that he lacked



standing because although he had "an interest" he lacked a "direct stake [ ] in the abortion process." 476 U.S. at 66, 106 S.Ct. at 1706.

From *Diamond*, Yniguez would have us conclude that a mere "philosophical interest in the outcome of litigation is insufficient to confer a right to appeal." While we agree with this statement, we reject the suggestion that AOE and Park are mere " 'concerned bystanders,' who will use [the appeal] simply as a 'vehicle for the vindication of value interests.' " *Diamond*, 476 U.S. at 62, 106 S.Ct. at 1703 (*quoting Sierra Club v. Morton*, 405 U.S. 727, 740, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972); *United States v. SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973)). We find that AOE's and Park's interest in Article XXVIII is qualitatively distinct from the physician's interest in the Illinois abortion law at issue in *Diamond*. Unlike the physician, neither AOE nor Park is a mere "private citizen." 476 U.S. at 64, 106 S.Ct. at 1704. As the principal sponsors of Article XXVIII, their relationship to Article XXVIII is closely analogous to the relationship of a state legislature to a state statute. It is therefore useful to consider the law of legislative standing.

In *Karcher v. May*, 484 U.S. 72, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987), the Supreme Court held that state legislators who intervened in their official capacities to defend a lawsuit challenging the constitutionality of a statute that had been enacted over the Governor's veto did not have standing once they were out of office. But in arriving at that decision, the Court clearly indicated that jurisdiction had been proper in the district court and the court of appeals so long as the legislators held office, notwithstanding the fact that the Attorney General had declined to defend the suit. See *id.* at 72-73, 108 S.Ct. at 390-91. As Justice White pointed out in his concurrence in the judgment, by allowing

the legislators to intervene to defend the suit when the state executive did not wish to assert the statute's constitutionality, the Court "acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court." *Id.* at 84-85, 108 S.Ct. at 396. Furthermore, as the Court recognized over a half century ago, state legislators claiming that their votes "have been overridden and virtually held for naught" by an Executive decision have a sufficient stake in the outcome under Article III to vindicate their interests in federal court. *Coleman v. Miller*, 307 U.S. 433, 438, 59 S.Ct. 972, 975, 83 L.Ed. 1385 (1939) (holding that 20 state senators who voted against ratification of a federal constitutional amendment had standing to challenge the state lieutenant governor's legal authority to cast the deciding vote in favor of the amendment).[2]

***733** It is therefore clear that were Article XXVIII a statute

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[2]Also relevant in this regard is *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). In a section of the opinion in that case captioned "Case or Controversy" the Court stated that where the Executive Branch agreed with Chadha that the challenged statute was unconstitutional, Congress' defense of the statute on appeal guaranteed the "concrete adverseness" required by Article III. *Id.* at 939, 103 S.Ct. at 2778. The Court summarized its prior cases thus: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Id.* at 940, 103 S.Ct. at 2778. Although the question whether individual members of Congress have standing to sue seeking enforcement of a federal law is an open one, *see Burke v. Barnes*, 479 U.S. 361, 107 S.Ct. 734, 93 L.Ed.2d 732 (1987), the separation of powers issues raised by that question are not implicated in this case.



rather than a ballot initiative, the Arizona legislature would have standing to defend its constitutionality.[3] AOE argues that as the principal sponsor of the initiative, it stands in an analogous position to a state legislature. We agree. The official sponsors of a ballot initiative have a strong interest in the vitality of a provision of the state constitution which they proposed and for which they vigorously campaigned. The district court's decision striking down Article XXVIII essentially nullified the considerable efforts AOE made to have the initiative placed on the ballot and to obtain its passage. *Cf. Coleman v. Miller, supra*, 307 U.S. at 439, 59 S.Ct. at 975.

Arizona law recognizes the ballot initiative sponsor's heightened interest in the measure by giving the sponsor official rights and duties distinct from those of the voters at large. *See, e.g.,* Ariz.Rev.Stat.Ann. § 19-111 ("person or organization intending to propose a law or constitutional amendment by petition" must file an application with the secretary of state); § 19-122 (if the secretary of state rejects a petition for a ballot initiative, he must provide the sponsor with a written statement of reasons for doing so); § 19-124 (sponsor may submit an argument in favor of the initiative at the time the application is filed).

Moreover, as appears to be true in this case, the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative; for better or worse, the people generally resort to a ballot

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[3]That the Supreme Court allowed legislative standing in the cases we have discussed shows that legislative standing is appropriate both under Article III and the prudential standing rules the Court has articulated. *See, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100, 99 S.Ct. 1601, 1607-08, 60 L.Ed.2d 66 (1979).

initiative precisely because they do not believe that the ordinary processes of representative government are sufficiently sensitive to the popular will with respect to a particular subject. While the people may not always be able to count on their elected representatives to support fully and fairly a provision enacted by ballot initiative, they can invariably depend on its sponsors to do so.

Finally, it is worth noting that there is a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning that initiative to intervene pursuant to Fed.R.Civ.P. 24(a). *See infra*, part I.B.2. While the interest required to intervene under the Rule is not identical to the interest required for standing under Article III, there are substantial similarities between the two. For the reasons we have already given, the added interest necessary to confer Article III standing--a particularized injury that distinguishes AOE from "concerned bystanders," , 476 U.S. at 62, 106 S.Ct. at 1703--is present here.

We conclude that AOE, as the sponsor of Article XXVIII, has standing to pursue the instant appeal.[4]

Quite apart from our consideration of AOE's status as

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[4]We do not suggest that the government of Arizona does not also have a sufficient interest in the validity of a provision of the Arizona Constitution to satisfy Article III. Although we need not address the question whether the Attorney General has Article III standing to pursue the present appeal, *see infra* at 737 (holding that Attorney General is estopped from re-entering the case as a party), we may assume that whenever the constitutionality of a provision of state law is called into question, the state government will have a sufficient interest under Article III. We merely point out that in the case of a successful ballot initiative, its sponsor will also have a sufficient interest.



the sponsor of the initiative, we hold that Park, as an individual, has standing under the traditional Article III standards applicable to all private citizens. Yniguez argues that because the district court's decision has not "injured" ***734** Park in a tangible way, the Article III standing requirements are not met. However, when we consider Park's standing as an individual the relevant question is not: has Yniguez injured Park? Rather, because Yniguez brought this case seeking declaratory and injunctive relief, the crucial question for determining whether there is an Article III case or controversy is instead: was there a more than speculative threat that Park was about to bring an action to enforce Article XXVIII against Yniguez? If so, then there was a sufficiently ripe case or controversy between Yniguez and Park to justify an action for declaratory relief. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979) (federal declaratory relief is available "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a [provision of state law], and there exists a credible threat of prosecution thereunder...."); *Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir.1989) (because of the risk of self-censorship, a reasonable fear of prosecution for the exercise of first amendment rights was shown where plaintiff alleged that sheriff had conducted preliminary investigation of his activities and others had been indicted for similar activities); *Polykoff v. Collins*, 816 F.2d 1326, 1331 (9th Cir.1987) (declaratory relief available because of the chilling effect of obscenity statute).

It is plain from the face of Article XXVIII, that Park

could have sued Yniguez to enforce it.[5] We must now determine whether there was a more than speculative threat that he would do so. As we have indicated, this is a question of ripeness.

Generally the ripeness question on appeal in a declaratory judgment case focuses on whether there was a ripe case or controversy when the suit was initiated. *See Ripplinger*, 868 F.2d at 1047 (discussing reasonableness of the plaintiff's fear of prosecution "at the time of filing [of the] lawsuit"). Because Park was not a party to the action below, the district court made no specific finding as to whether he had threatened to enforce Article XXVIII against Yniguez. However, the Attorney General has attested that Park and AOE did not intervene at an early stage in the proceedings only because they had been expressly assured by the Attorney General that he would vigorously represent their interests. Thus, we may treat AOE's and Park's assertion of their interests in the litigation to the Attorney General as an expression, at the time of the initiation of the proceedings, of their intention to see Article XXVIII enforced against Yniguez. At the outset of litigation, Yniguez therefore could have had a reasonable expectation

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[5]Section Four of Article XXVIII provides for enforcement actions by any "person who resides in or does business in this State." This clearly includes Park, as Yniguez admits. In her brief in this court, Yniguez states that "an action could be instituted by AOE and Park against Kelly Yniguez should they believe her actions violate Article XXVIII." We note that "person" may also include an organization such as AOE. However, because we hold that AOE has standing in the same way that a legislature might, we need not attempt to predict whether the courts of Arizona would entertain a suit brought by AOE to enforce Article XXVIII.



that Park (and possibly AOE as well) would bring an enforcement action against her. As a result, the *United Farm Workers Nat'l Union* requirements are met.

We therefore hold that AOE and Park have standing to appeal.

B. The *Sagebrush Rebellion* Criteria

We next consider the four criteria under Fed.R.Civ.P. 24(a) in turn.

1. Timeliness

The district court found that AOE's and Park's motion to intervene was timely. The court applied the general rule that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal. However, the district court also considered whether the motion was timely in light of the fact that AOE and Park did not move to intervene until after the judgment. The district court noted that AOE's and Park's complaints about the adequacy of the Attorney General's *735 defense of Article XXVIII indicated that they should have intervened during the litigation. The court also noted that AOE and Park did not realize the supposed inadequacy of the Attorney General's defense until very late in the proceedings. The court further acknowledged that an early motion to intervene could have been futile because of the Attorney General's opposition to intervention and his assurances to AOE and Park that he would vigorously defend Article XXVIII. After considering all of these factors, the district court concluded that the motion was timely.

There is no contention that the time that elapsed between the judgment and AOE's and Park's motion was excessive. The only question here is whether AOE and Park should have attempted to intervene before the final judgment in the court below. Although, as the district court noted, the most prudent course for AOE and Park to have followed

would have been to attempt to intervene as soon as they had doubts about the Attorney General's representation, we cannot fault them for relying on that official's assurance that he would defend Article XXVIII fully. Having received that assurance, AOE and Park were not required to monitor the litigation closely to see if the government was asserting a position which, if accepted, could prejudice their interests. Moreover, given the Attorney General's stated view that he would fully defend Article XXVIII, we doubt whether an early motion by AOE and Park to intervene would have been granted, especially if it had been opposed by the Attorney General. Thus, we cannot say that the district court abused its discretion by finding that their motion to intervene was timely.[6]

2. Interest in the Subject Matter of the Litigation

There appears to be a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of the litigation to intervene pursuant to Fed.R.Civ.P. 24(a). As we stated in *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir.1982), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983), because "[r]ule 24 traditionally has received a liberal construction ... the public interest group that sponsored the initiative [is] entitled to intervention as a matter of right under Rule 24(a)." *Accord Sagebrush Rebellion*, 713 F.2d at 527-28. Moreover, because the

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[6] It is worth recalling that the district court dismissed all the defendants except the Governor at the same time that it decided the merits. Thus, AOE and Park were first alerted to the inadequacy of the state's representation of its interests when the district court decided the merits. As we have stated, there is no contention that they did not act in a timely fashion after learning of that decision.



Article III standing requirements are more stringent than those for intervention under rule 24(a), *see supra*, p. 731-32, our determination that AOE and Park have standing under Article III compels the conclusion that they have an adequate interest under the rule.

3. Practical Impairment Absent Intervention

Yniguez argues that AOE's and Park's interests are not impaired by the district court's decision because they retain the right to sue in state court to enforce Article XXVIII. Yniguez correctly notes that the district court's decision is not res judicata with respect to AOE and Park. As the Supreme Court has stated, "[i]t is a principle of general application in anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 2184, 104 L.Ed.2d 835 (1989) (*quoting Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940)). However, this principle is not dispositive, because the question here is whether the district court's decision will result in practical impairment of the interests of AOE and Park, not whether the decision itself binds them.

Yniguez next contends that the district court's judgment is no impediment to AOE ***736** and Park because it is not a binding precedent on the state courts. All parties agree that it is not binding in the sense that the courts of Arizona are free to place a different interpretation on Article XXVIII and thereby render it constitutional. That is, there is no dispute that the Arizona courts are the definitive expositors of Arizona state law. However, Yniguez' argument goes one step further. She contends in her brief that even assuming that the district court correctly understood the meaning of Article XXVIII, its decision that

Article XXVIII is unconstitutional as a matter of federal law has no stare decisis effect in the Arizona state courts.[7] The district court also took this narrow view of the effect of its decision. *See supra*, p. 730 & n. 1. AOE and Park contend that the view advanced by Yniguez in her brief, and accepted by the district court, overstates the power of state courts to ignore decisions of the lower federal courts.

The view that decisions of the lower federal courts on questions of federal law do not bind the state courts has gained considerable acceptance in the academic literature.[8] It has also been expressed by some state courts, although others

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[7]At the oral argument, Yniguez appeared to retreat from her categorical view. In any event, we note that there is considerable irony in the position Yniguez took on this issue in her brief. We may assume that she brought her suit in the hope of obtaining a broad declaration that Article XXVIII is unconstitutional on its face and therefore may not be applied constitutionally to anyone. That is, after all, precisely what the district court held. Having prevailed in the district court Yniguez argued in her brief that we should declare that all she really won is an extremely narrow ruling that Article XXVIII cannot be constitutionally applied to her by the state, the Governor, or the Attorney General, but that private parties are free to enforce it against her, and both official and private parties may enforce it against anyone else.

[8] *See, e.g.*, Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv.L.Rev. 1130, 1231 n. 495 (1986); Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw.U.L.Rev. 759, 771 (1979); Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1053 (1977).



have expressed the opposite view.[9] And while the Supreme Court has never squarely faced the question, several individual justices have stated that principles of federalism require that the state courts be treated as coordinate and coequal with the lower federal courts on matters of federal law.[10]

Despite the authorities that take the view that the state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view. Having chosen to create the lower federal courts, Congress may have intended that just as state courts have the final word on questions of state law, the

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[9] *Compare Bradshaw v. State*, 286 So.2d 4, 6 (Fla.1973), *cert. denied*, 417 U.S. 919, 94 S.Ct. 2626, 41 L.Ed.2d 225 (1974) ("It is axiomatic that a decision of a federal trial court, while persuasive if well-reasoned, is not by any means binding on the courts of a State"); *State v. Coleman*, 46 N.J. 16, 35-38, 214 A.2d 393, 403-05 (1965), *cert. denied*, 383 U.S. 950, 86 S.Ct. 1210, 16 L.Ed.2d 212 (1966); *Iowa Nat'l Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445, 454 (1930), *with Handy v. Goodyear Tire & Rubber Co.*, 230 Ala. 211, 160 So. 530 (1935); *Kuchenmeister v. Los Angeles & S.L.R.*, 52 Utah 116, 172 P. 725 (1918).

[10] *See Steffel v. Thompson*, 415 U.S. 452, 482 n. 3, 94 S.Ct. 1209, 1227 n. 3, 39 L.Ed.2d 505 (1974) (Rehnquist, J., joined by Burger, C.J., concurring); *Perez v. Ledesma*, 401 U.S. 82, 125, 91 S.Ct. 674, 697, 27 L.Ed.2d 701 (1971) (Brennan, J., joined by White and Marshall, JJ., dissenting) (referring only to "the persuasive force" of a decision of a lower federal court on state courts). *See also Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir.), *cert. denied*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1970) (holding that federal district court's decision on question of federal law was not a binding precedent for the Illinois courts).

federal courts ought to have the final word on questions of federal law. The contrary view could lead to considerable friction between the state and federal courts as well as duplicative litigation. Furthermore, the sparse authority on the subject appears to be concerned largely with the *stare decisis* effect of federal district court decisions on subsequent state court actions, rather than the effect of decisions of the federal courts of appeals; there may be valid reasons not to bind the state courts to a decision of a single federal district judge--which is not even binding on the same judge in a subsequent *737 action--that are inapplicable to decisions of the federal courts of appeals. Finally, if decisions of the federal courts of appeals invalidating state laws carry no authority, it would be difficult to comprehend why for so many years a right of appeal to the Supreme Court was provided in all cases in which federal circuit courts held state statutes unconstitutional. *See* 28 U.S.C.A. s 1254(2) (West 1979).[11] In any event, we may assume without deciding that an unappealed judgment of the district court would have no precedential weight in the Arizona courts, for even under this assumption, we find that the interests of AOE and Park are practically impaired by the decision.

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[11] Congress eliminated the provision for such appeals in 1988. *See* Supreme Court Case Selections Act, Pub.L. 100-352 (1988); 28 U.S.C.A. s 1254(2) (West Supp.1990). However, the repeal was not the result of a determination by Congress that decisions of the federal courts of appeals invalidating state laws are without binding force. Rather, it was part of an Act eliminating nearly all of the Supreme Court's mandatory jurisdiction in response to the Court's unanimous request that Congress make its jurisdiction discretionary whenever possible. H.R.Rep. No. 100-660, 100th Cong., 2d Sess., 2, *reprinted* in 1988 U.S.Code Cong. & Admin.News 766, 767.



There is no dispute that the declaration that Article XXVIII is facially invalid binds Governor Mofford and her successors in any actions against Ms. Yniguez. This fact alone suggests that the interests of AOE and Park have been practically impaired. Moreover, there is at least some uncertainty as to whether it would also bind the Governor of Arizona in enforcement suits against defendants other than Ms. Yniguez. *Compare H.L. v. Matheson*, 450 U.S. 398, 406, 101 S.Ct. 1164, 1169, 67 L.Ed.2d 388 (1981) (stating categorically that an unappealed ruling of a federal district court is binding on a state party), *with United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984) (holding that non-mutual offensive collateral estoppel may not be applied against the federal government). As a result, Arizona's Governor may hesitate to take any steps to implement Article XXVIII. Indeed, the Attorney General has represented to this court that in light of the district court's decision, he believes that any enforcement of Article XXVIII would be of questionable legality, and we cannot fault him for his willingness to abide by a federal court's declaration that the provision is unconstitutional. Yet Article XXVIII places an affirmative duty on that official to "take all reasonable steps to preserve, protect and enhance the role of English as the state's official language." The district court's decision casts a cloud over the state's power to enforce Article XXVIII. While it may have left AOE's and Park's right to sue intact, a right to bring a private enforcement action is not a complete substitute for executive enforcement and implementation. Hence, as a practical matter, the district court's ruling substantially weakened Article XXVIII, and thereby impaired the interest of AOE and Park.

Furthermore, even if we assume that the district court's ruling has no binding effect on the Arizona courts, we cannot wholly overlook the fact that jurisprudential concerns

might cause those courts to find the reasoning of the district court more persuasive than they might otherwise find a similar argument to be, and that they might choose to accept the district court's reasoning to avoid confusion, lack of finality, and disrespect for law. *See Commonwealth v. Negri*, 419 Pa. 117, 121-22, 213 A.2d 670, 672 (1965). In any event, the district court's opinion will have impaired AOE's and Park's interests in the vitality of Article XXVIII.

4. Inadequacy of Representation by Other Parties

Having decided not to appeal the district court's decision on the merits, the Governor inadequately represents the interests of AOE and Park. Moreover, as we hold below, the Attorney General is estopped from re-entering this litigation as a party. *See infra*, p. 738. Thus, absent an appeal by AOE and Park, no party will be able to assert Article XXVIII's constitutionality. Because no representation constitutes inadequate representation, the fourth *Sagebrush Rebellion* criterion is met.

***738** Furthermore, even if the government were a party to this appeal, that would not ensure adequate representation of the interests of AOE and Park. The Attorney General has issued an opinion narrowly construing Article XXVIII. In his view, the English-only requirement applies solely to official acts of the Arizona government, and does not prohibit the use of languages other than English by state personnel such as Yniguez. The district court rejected the Attorney General's proffered construction because it is not binding on the Arizona courts and because, in the view of the district court, it contradicts the plain language of Article XXVIII. By contrast with the Attorney General, AOE and Park agree with the district court that Article XXVIII should be construed broadly, although they disagree with the court that the provision so construed is unconstitutional. In any event, at this stage in the proceedings it is clear that the



Attorney General would not represent the views of AOE and Park adequately.

II. The Attorney General's Intervention Motion

Attorney General Corbin claims a right to intervene under Fed.R.Civ.P. 24(a) and 28 U.S.C. § 2403. Because we hold that there is an Article III "case or controversy" between Yniguez (on the one hand) and AOE and Park (on the other), we need not address the question whether the Attorney General would have standing to appeal under Article III if no other party were willing and able to appeal. Thus, we turn directly to his claims under Rule 24(a) and section 2403.

A. Rule 24(a)

We note initially that the Attorney General did not contend in the district court that his putative right to intervene was located in Rule 24(a). The sole basis for his intervention motion in the court below was section 2403. Thus, we have serious doubts whether his claim under Rule 24(a) is properly before us. Even if it is, however, we find that having argued in the district court that he should not be a party, the Attorney General is estopped from now arguing that he should be.

As we explained in *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir.1990), "'[t]he doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.' " (*quoting, Religious Technology Center v. Scott*, 869 F.2d 1306, 1311 (9th Cir.1989) (Hall, J., dissenting)). Although "'most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one,' " *id.*, it applies more generally as well. In *Russell*, for example, we applied the

discretionary estoppel doctrine to preclude inconsistent legal assertions.

This case is ideally suited for the application of judicial estoppel. From the fact that we have estopped litigants from asserting mere arguments that are inconsistent with arguments on which they prevailed in the district court, it follows *a fortiori* that we will not allow a party to seek an outcome directly contrary to the result he sought and obtained in the district court. Yet that is precisely what the Attorney General is attempting to do here. The Attorney General represented to the district court that he did not wish to be a party to this litigation, presented arguments in support of that position, and persuaded the district court to rule in his favor on that point. Only after the district court granted the Attorney General's request and then reached a result on the merits with which the Attorney General disagreed did that official decide that he would rather be a party after all. We will not accept such a reversal in position.

Nor is the Attorney General's about-face excused by the Governor's decision not to appeal. Governor Mofford's position on Article XXVIII was well known at the outset of this litigation. Nonetheless, the Attorney General presented separate arguments to the district court in support of ***739** dismissing the case against each individual defendant. The Attorney General should have realized that the district court might accept some but not all of these arguments, and should have made his tactical decisions accordingly.

Finally, the Attorney General argues that he is entitled to intervene as a party because no prejudice to Yniguez would result from his intervention. Were we to hold that AOE and Park could not intervene this argument would surely be incorrect. In such circumstance, allowing the Attorney General to intervene would mean that there would be an appeal of an otherwise unappealable judgment in



Yniguez' favor. Certainly this would prejudice Yniguez. Moreover, even in light of our decision that AOE and Park may appeal, the Attorney General's prejudice argument misses the point. The principal concern of the doctrine of judicial estoppel is the integrity of the judicial process. The district court expended valuable judicial resources evaluating and granting the Attorney General's request that he be dismissed from the suit. We will not render that expenditure for naught simply because subsequent circumstances, all of which were foreseeable, caused the Attorney General to change his mind.

B. Section 2403(b)

[11] 28 U.S.C. § 2403(b) provides: In any action, suit or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall ... permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The district court held that the instant case is not an action to which an officer of the state is not a party because the Governor is a party, albeit one who has not chosen to appeal. We consider this an overly narrow reading of the statute. Section 2403(b) entitles the Attorney General to make an argument in a "proceeding" to which no representative of the state is a party. Having failed to file a notice of appeal, and having accepted the district court's decision on the merits, the Governor cannot realistically be considered a party to an appeal by AOE and Park. The Governor is no longer in any sense a participant. Moreover, whether or not the Governor technically remains a party, the simple fact is that unless we allow the Attorney General to make his argument we will have to pass judgment on the constitutionality of a provision

of Arizona law without hearing the views of the state of Arizona. That result would be contrary to both the letter and the spirit of section 2403(b).

From the face of section 2403(b) it is apparent that the Attorney General may intervene on appeal, but only to the extent that the section permits. The statute confers a right to intervene in any "court of the United States," a phrase which includes a circuit court of appeals. *See Wallach v. Lieberman*, 366 F.2d 254, 258 n. 9 (2d Cir.1966) (noting that intervention under section 2403(b) is appropriate at any stage of the proceedings) (*citing Glidden Co. v. Zdanok*, 368 U.S. 814, 82 S.Ct. 56, 7 L.Ed.2d 22 (1961)). However, contrary to the Attorney General's contention, section 2403(b) confers only a limited right upon him. Under that section, the Attorney General is permitted to make an argument on the question of constitutionality, but he is given no right to appeal as a party. Before the Attorney General can assert any right at all there must be a viable proceeding in which that right may be asserted. It is only because we hold that AOE and Park may appeal that we conclude that there is such a proceeding and that the Attorney General may, therefore, pursuant to section 2403(b), make an argument regarding constitutionality.[12]*740

Finally, we note that there is no inconsistency between our determination that the Attorney General may make an argument about the constitutionality of Article

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[12]It is worth mentioning that Yniguez' attorney stated during oral argument that if we were to hold that AOE and Park have a right to appeal, he would not object to the Attorney General's participation in the appeal as well. However, our decision that the Attorney General has a right to intervene under section 2403(b) does not depend on this concession.



XXVIII and our decision that he is estopped from claiming a right to appeal as a party. We emphasize that under section 2403(b) the Attorney General is not a party. His right to argue the constitutionality of Article XXVIII is contingent upon AOE and Park's bringing the appeal at issue. So long as there is such an appeal he may file a brief and participate in the oral argument, but having asked the district court to dismiss him as a party, he cannot now become one again. Should AOE and Park cease to be parties to this action for any reason, the Attorney General will have no right to complain.[13]

## CONCLUSION

The district court's denial of the intervention motion of AOE and Park is reversed. The district court's denial of the Attorney General's intervention motion is affirmed insofar as the Attorney General sought to be designated a party to this appeal and reversed insofar as he seeks to make an argument as to the constitutionality of Article XXVIII pursuant to 28 U.S.C. s 2403(b). We shall retain jurisdiction

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[13]As we have noted, the Attorney General has taken a somewhat narrower view of the effect of Article XXVIII than the view taken by AOE. In pursuing the question of constitutionality the Attorney General will necessarily argue questions of interpretation of the state provision at issue. Our holding that section 2403(b) should be narrowly construed with respect to the Attorney General's status should not be taken as an indication that we would similarly limit the scope of his argument. To the contrary, we think the court will benefit from receiving the widest range of views on the important issues presented in this case, including the proper meaning of Article XXVIII.

over the appeal of the district court's decision on the merits.[14]

AFFIRMED IN PART AND REVERSED IN PART.

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[14]Yniguez has requested attorneys' fees under 42 U.S.C. § 1988. Because we have not yet heard the appeal on the merits we do not know whether she is a prevailing party entitled to attorneys' fees. We will decide that question after we decide the merits.



**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

[redacted]

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
50 U. N. Plaza, Rm. 59
San Francisco, CA 94102-4909
August 14, 1991

USDC, Phoenix
District of Arizona (Phoenix) U.S. Courthouse
230 N. First Ave., Room 1400
Phoenix, AZ 85025

| C.A. No. | TITLE | AGENCY/D.C. No. |
|---|---|---|
| 90-15546 | Yniguez v. State of Arizona | CV-88-1854-PGR |
| 90-15581 | Yniguez v. Mofford | CV-88-1854-PGR |

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter.

[x] Certified copy of the Decree of the Court
[ ] Judgment of the National Labor Relations Board
[ ] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: Sylvia McAlister
Deputy Clerk



**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

[Initial Address Omitted]

[Caption Omitted]

_____ )

Nos. 90-15546 and 90-15581

**SUGGESTION OF MOOTNESS**

Maria-Kelly F. Yniguez, appellee in the captioned matter and plaintiff below, is no longer employed by the State of Arizona and has not been so employed since April 20, 1990. (See attached affidavit of Rosanne Ruelas and resignation letter of Maria-Kelly F. Yniguez.) In light of this development, the state suggests that this case may lack a viable plaintiff and, hence, may be moot. While preserving its right to make appropriate motions, the state requests that this Court inquire into the status of the plaintiff/appellee and the case.

Respectfully submitted this 12th day of September, 1991.

GRANT WOODS
Attorney General
REBECCA W. BERCH
Solicitor General
Attorneys for Appellants

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

[Initial Address Omitted]

[Caption omitted]

**INTERVENORS/APPELLANTS ROBERT D. PARK AND ARIZONANS FOR OFFICIAL ENGLISH RESPONSE TO SUGGESTION OF MOOTNESS**

[2]

This matter came before the Court on a "Suggestion of Mootness" by the Attorney General of the State of Arizona filed on September 12, 1991. Appellants Arizonans for Official English and Robert Park[1] (jointly "AOE" or "the initiative proponents") are the only defendants/appellants remaining in the case, having successfully intervened for purposes of taking their appeal. __ F.2d __, 1991 WL 130300 (9th Cir. July 19, 1991). The underlying case is reported as Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990).

Appellants are awaiting a briefing schedule from the Court for further proceedings. Preliminary matters awaiting action by the Court are the recall of the Mandate and whether the Clerk of the Court should return the record to the District Court, given the Court's statement: "We shall retain jurisdiction over the appeal of the district court's decision on the merits." Slip Op. 12.

This memorandum responds to the "Suggestion of

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[1]Appellants have notified both the Clerk and West Publishing Co. that the caption of the case as reported erroneously recites Mr. Park's name as "Parks" (i.e., plural). The Court's opinion accurately names Mr. Park (singular).



Moctness," noting that the Suggestion overlooked two [3] important points concerning mootness and that the Court, if it finds the appeal moot, should vacate the lower court's decision and consider sanctioning counsel who concealed information from the Court.

**MOOTNESS**

The concept of mootness is rooted in the "case and controversy" requirement of Article III of the United States Constitution. DeFunis v. Odegaard, 415 U.S. 908 (1974). The Supreme Court informs us that, for Article III purposes, "a case is moot when the issues presented are no longer 'live' or the parties lack a legally recognizable interest in the outcome." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (emphasis added).

**MISSED POINT I - THE POSTURE OF THE PARTIES**

Unlike in private disputes, mootness in controversies involving the constitutionality of public laws is not an easy determination. On the one hand, the Supreme Court counsels restraint, as in United States v. W.T. Grant Co., 345 U.S. 629, 631 (1953). (" ... [T]o say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right .... The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.").

On the other hand, the Court is unwilling to entertain cases where the actual parties are willing to allow the dispute to rest. Karcher v. May, 484 U.S. 72, [4] 83-84 (1987) ("This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party ... declined to pursue its appeal."). The "losing party" here wants to continue the appeal. AOE is the losing party, as this Court noted: "The District Court's decision striking down Article XXVIII essentially nullified the

considerable efforts AOE made to have the initiative placed on the ballot and to obtain its passage." Slip Op. 5.

The "Suggestion of Mootness" misses this point. The question in a public law mootness case is not only whether there is a "viable plaintiff," "Suggestion of Mootness," 1, but whether the Court believes the case can go on as a case or controversy.

For example, in Allee v. Medrano, 416 U.S. 802, 810 (1974), the Supreme Court allowed a labor union to continue an otherwise moot case against government harassment, saying:

> Nor can it be argued that the case has become moot because appellees have abandoned their efforts as a result of the very harassment they sought to restrain by this suit. There can be no requirement that appellees continue to subject themselves to ... unlawful restrictions upon their liberties throughout the pendency of the action in order to preserve it as a live controversy. In the face of appellants' conduct, appellees sought to vindicate their rights in the federal court .... We may not assume that because during this period they directed their efforts to the judicial battle, they have abandoned their principal [5] cause. Rather, the very purpose of the suit was to seek protection of the federal court so that the efforts at unionization could be renewed.

AOE does not believe that Yniguez suffered any such treatment (nor, as will be shown below, does Yniguez's own application of the law matter in this case). Yet, the situation is analogous. Yniguez requested damages and seems to feel her equal protection argument (necessary for the finding of damages) is still alive. See, e.g., Plaintiff's Response to Motion



to Intervene of (...OE), Pp. 4-5 ("alternative claim based upon denial of equal protection.")

Thus, and especially in light of the discussion below on Ms. Yniguez's continuing role as an active representative of a group interested in this case, the "Suggestion of Mootness" misses the essential element of mootness.

**MISSED POINT II - THIS IS AN OVERBREADTH CASE**

The "Suggestion of Mootness" also misses the essential point about the lower court's decision – this is a case in which Yniguez's own rights are no longer at issue. As the District Court put it:

> The court's determination of Article XXVIII's facial validity is not dependent upon Yniguez having a First Amendment right to speak a language of her choice during the performance of her official duties .... All the Court ... does find in this regard, is that Article XXVIII is so broad as to inhibit the constitutionally protected speech of third parties.- ...When read at its full literal breadth, Article XXVIII would force Arizona [6] governmental officers and employees whose use of a non-English language in the performance of their official duties is protected by the First Amendment, such as state legislators speaking to constituents in a language other than English, state employees officially commenting on matters of public concern in a language other than English, and state judges performing marriage ceremonies in a language other than English, to either violate their sworn oaths to obey the state constitution, and thereby subject themselves to potential sanctions and private suits, or to

curtail their free speech rights.

730 F. Supp. at 314 (emphasis added).

There are circumstances in which overbreadth cases can be pursued by persons who may have lost the character which allowed them to bring the original suit. 13A Wright, Miller & Cooper, Federal Practice and Procedure, § 3533.9, at 406 (1984). Overbreadth cases are one such circumstance. In Fox v. Board of Trustees of State Univ. of New York, 764 F. Supp. 747, 755-56 (N.D.N.Y. 1991), for example, a district court assumed, "arguendo that an overbreadth challenge would operate to defeat plaintiffs' apparent mootness problem," but rejected the claim because no court (in nine years of litigation) had ever held plaintiffs to have been operating as representatives. In this case, on the other hand, the District Court found that the constitutional claim operated specifically as to third parties.

And no one can fault Yniguez for her zealous advocacy. Some nine months after resigning, her counsel [7] vigorously and competently represented her claim to this Court in oral argument. Since she is apprently capable of and willing to continue her representation under the overbreadth doctrine, she should be allowed to do so.

## NECESSARY POST-MOOTNESS CONSIDERATIONS

If, despite the foregoing points, this Court decides to declare this controversy moot, the Court should do two things:

First, the Court must vacate the lower court decision. This situation requires a classic application of the rule in United States v. Munsingwear, 340 U.S. 36 (1950). If the defendant requests the Court to do so, the Court must vacate a moot lower Court decision and remand the case for dismissal. AOE respectfully so requests the Court. Since this case would be unreviewable solely because of mootness, and through no action of AOE, the lower court decision should not be allowed



to spawn any legal consequences. 340 U.S. at 39. See also, City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288 n.9 (1982).

Second, the Court should consider whether, in light of its finding on mootness, Yniguez and her counsel are liable to AOE for its costs or for sanctions. Fed. R. Civ. Pro. 11; 8 U.S.C. § 1927. It is the continuing duty of an attorney to inform the Court of events that may moot a case. Board of License Commrs. v. Pastore, 469 U.S. 238, 240 (1985) ("without delay"; emphasis in original). [8] "This part of the essential trust that judges place in attorneys who come before the bench." Van Bourg, Allen, Weinberg, & Roger v. NLRB, 762 F.2d 831, 832-33 (9th Cir. 1985).

In addition, AOE respectfully suggests that this Court allow additional briefing and a hearing before declaring this case moot. The Supreme Court used this procedure in considering whether a recent language-related case was moot. Russoniello v. Olagues, 481 U.S. 1012 (1987).

Respectfully submitted this 20th day of September, 1991.

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

[Initial Address Omitted]

[Caption Omitted]

**APPELLEE YNIGUEZ'S RESPONSE REGARDING MOOTNESS CONSIDERATIONS**

Factual Background and Procedural History

The underlying action was initiated by Appellee Kelly Yniguez seeking, inter alia, declaratory relief adjudicating Article XXVIII of the Arizona Constitution, an "English Only" amendment, to be invalid as violative of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §2000d of the Civil Rights Act of 1964. Joining Kelly Yniguez as a plaintiff in the Second Amended Complaint was Arizona State Senator Jaime Gutierrez. Both plaintiffs sought identical relief. In their Demand for Judgment, plaintiffs sought injunctive and declaratory relief, award of their attorneys' fees and costs, and "all other relief that the Court deems just and proper under the circumstances." Joint Excerpts of Record (hereinafter "EX") , p.138.

Following a trial on the merits, the District Court dismissed Senator Gutierrez as a plaintiff and granted the Arizona Attorney General's Motion to Dismiss both the Attorney General and the Director of the Department of Administration as parties. As a consequence, the only parties remaining to the action were Governor Rose Mofford and Kelly Yniguez. EX, p.163.

The District Court denied the requested injunctive relief and awarded no damages. However, the Court found Article XXVIII to be substantially overbroad in violation of the First



Amendment to [2] the United States Constitution. In so finding, the District Court specifically noted that Kelly Yniguez' standing was:

> predicated in part on her right to assert the unconstitutionality of Article XXVIII on behalf of third parties not before the court whose rights are allegedly chilled by the overbreadth of the Article.

EX, p.153. The District Court also determined that her claim or the overbreadth doctrine was sufficient "to confer standing on her even if her own First Amendment rights are not violated by Article XXVIII." EX, p.154. Pointedly, the District Court consciously determined not to address the additional claims asserted by Kelly Yniguez:

> Given the Court's conclusion that Article XXVIII is substantially overbroad, Yniguez is entitled to a judgment pursuant to 28 U.S.C. §2201 declaring Article XXVIII unconstitutional as violative of the First Amendment. Having so found, the court does not reach the plaintiffs' claims that Article XXVIII also violates the Fourteenth Amendment and 42 U.S.C. §2000d.

EX, p.162. Neither Kelly Yniguez nor Governor Mofford, the only defendant remaining and bound by the judgment, appealed.

However, after Governor Mofford publicly announced her intention not to appeal the judgment, leave to intervene postjudgment for the purposes of "taking an appeal" was sought by Arizonans for Official English and Robert D. Park (hereinafter "AOE"). In addition, the Attorney General sought to reinsert himself into the proceedings for the purpose of pursuing an appeal. These motions were denied by the District Court. The Order denying the motions for leave to intervene

was appealed to [3] this court.[1]

This Court's opinion in this matter affirmed in part and reversed in part the District Court's decision on intervention. Pursuant to this Court's opinion, a mandate issued on August 14, 1991. The ultimate effect of the Mandate and this Court's Opinion is to permit AOE to file a Notice of Appeal challenging the merits of the District Court judgment.

On September 12, 1990, the Arizona Attorney General served a "Suggestion of Mootness" premised upon Ms. Yniguez' April 25, 1990 resignation from employment with the State of Arizona. No relief was sought except an inquiry into "the status of plaintiff/appellee and the case."[2] AOE responded

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[1]After AOE and the Attorney General filed Notices of Appeal from the trial court's decision denying their requests for leave to intervene, Senator Jaime Gutierrez, dismissed as a plaintiff by the trial court's final judgment, also filed a Notice of Appeal. A copy of that Notice is attached hereto as Exhibit A. The pendency of Senator Gutierrez' appeal was specifically raised following a pre-briefing conference held June 20, 1990. See Exhibit B hereto. As noted in the Statement of Related Cases filed by Kelly Yniguez in connection with her Answering Brief, Exhibit C hereto, which was filed belatedly due to inadvertence (see Exhibit D hereto), during a telephonic pre-briefing conference on June 29, 1990, it was agreed that Senator Gutierrez' appeal would be held in abeyance to be consolidated with the instant appeals should briefing on the merits become necessary. As a consequence, his appeal should be consolidated with the expected appeal on the merits to be filed by AOE.

[2]Counsel for Ms. Yniguez did not bring her resignation to this Court's attention because legal research disclosed that this case was not moot. Moreover, Ms. Yniguez' resignation was discussed with the prior counsel of record for the State of Arizona who also agreed this appeal should proceed.



to the Suggestion of Mootness on September 20, 1991. By order dated November 13, 1991, this Court ordered this Repsonse to be filed by [4] Ms. Yniguez.

Legal Argument

I. **KELLY YNIGUEZ CONTINUES TO HAVE A CONCRETE STAKE IN THE OUTCOME OF THE LITIGATION AND HENCE MEETS STANDING REQUIREMENTS.**

A. Ms. Yniguez Retains Unresolved Claims For Damages Which She Is Entitled To Pursue.

Several claims were asserted by both Kelly Yniguez and Senator Gutierrez in their Second Amended Complaint in the District Court (EX, pp.132-138). These claims were based upon the First and Fourteenth Amendments to the United States Constitution as well as 42 U.S.C. §2000d. Each of these claims, when proven, entitle plaintiffs to recover, at a minimum, nominal damages. Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). There, the United States Supreme Court held that, in an action under 42 U.S.C. §1983, even in the absence of proof of actual injury, plaintiffs were entitled to receive nominal damages for deprivation of procedural safeguards under the Fourteenth Amendment:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those

rights be scrupulously observed.

435 U.S. at 266. Of course, this Court also recognizes the availability of nominal damages in civil rights actions. Lokey v. Richardson, 600 F.2d 1265, 1266 (9th Cir. 1979), cert. denied, Richardson v. Lokey, 449 U.S. 884 (1980) (noting that in a §1983 [5] action "regardless of actual damages, appellant could be entitled to nominal damages if he prevailed"). Thus, upon success, the plaintiffs here were entitled to recover at least nominal damages.[3]

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[3]Although plaintiffs' prayer contains no specific request for an award of damages, they do pray for "all other relief that the Court deems just and proper under the circumstances." (EX, p.138, lines 9-10) Such a prayer is deemed sufficient to permit a party to seek money damages. Liberty National Insurance Holding Company v. The Charter Company, 734 F.2d 545, 560 n.31 (11th Cir. 1984) ("Liberty may seek money damages under its prayer for 'such other and further relief as this Court may deem just and proper'"). See also, Rental Development Corporation of America v. Lavery, 304 F.2d 839, 842 (9th Cir. 1962 where this Court declared:

> While applees did not, in their complaint, specifically request cancellation of the lease, they did include the usual prayer for "such other relief as to the Court may seem just and proper."
>
> * * * * *
>
> Where the judgment is not entered by default, the trial court is ordinarily required to grant the relief to which the party in whose favor it is rendered is entitled, "even if the party has not demanded such relief in his pleadings." Rule 54(c), Federal Rules of Civil Procedure, 28 U.S.C.A.

Thus, plaintiffs' Complaint fairly embodied a claim for nominal damages.



The existence of claims for nominal damages obviate any potential mootness. Lokey, supra at 1266; Nakao v. Rushen, 635 F.Supp. 1362, 1364 n.5 (N.D. Cal. 1986) ("However, [plaintiff] would be entitled to nominal damages, which are recoverable under 42 U.S.C. §1983. (citation omitted] Thus, the case is not moot."); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, [6] 81 L.Ed.2d 483, 104 S.Ct. 2576 (1984) where the Supreme Court noted:

> As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute.

467 U.S. at 571. Here, the plaintiffs' claims for nominal damages furnish a concrete interest in the outcome of the litigation obviating any claim of mootness. As a consequence, the Arizona Attorney General's suggestion of mootness should be rejected.

The Orders appealed from below were Orders of the District Court denying AOE's and the Arizona Attorney General's Motions to intervene as parties for the purposes of taking an appeal. Under such circumstances, the proper procedure is to remand this cause to the District Court so that the AOE can perfect an appeal. Pellegrino v. Nesbit, 203 F.2d 463 (9th Cir. 1953). Zuber v. Allen, 387 F.2d 862, 863 (D.C. Cir. 1967) (where the court directed the District Court to grant the motion of appellants for leave to intervene to pursue an appeal and required the intervenors to advise the District Court as to their intentions to prosecute an appeal and "if they shall decide to do so, the parties shall work out with the Clerk of this court an expedited briefing and hearing schedule"); Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir. 1944), cert. denied, Poretsky v. Wolpe, 323 U.S. 777 (1944).

One rationale for remanding the cause to the District Court for purposes of permitting the intervenors to file a notice of appeal is evident. At the conclusion of the trial below, [7]

Governor Mofford, the only remaining defendant in the case did not appeal the judgment against her. Since Governor Mofford did not appeal, Ms. Yniguez eschewed her right to appeal notwithstanding the fact that she received no nominal damages or relief under her claims premised on either the Fourteenth Amendment or 42 U.S.C. §2000d. Rule 4(a)(3), Fed.R.App.P. gives any party a right to appeal following timely submission of another appeal by a "party":

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

Here, neither AOE nor the Attorney General were parties entitled to appeal from the final District Court judgment. This Court's recent Order allows them to intervene as "parties" for purposes of taking an appeal. Once a notice of appeal is filed by AOE, Ms. Yniguez also has the right to appeal from the judgment. Because she has claims for nominal damages which have not been resolved, she retains a concrete stake in this litigation. As a consequence, this case is not moot.[4]

---

[4]Moreover, at the time the cause is remanded to the District Court to permit AOE to file a Notice of Appeal, Ms. Yniguez could conceivably amend her complaint to add, inter alia, new plaintiffs who are presently bilingual employees of the State of Arizona in positions analogous to that of Kelly Yniguez. These new plaintiffs would accept the contentions previously advanced and argued in this cause without either broadening or modifying those contentions. In the event this Court determines to proceed without remand to the District Court, leave to so amend will be sought from this Court.



[8]B. Ms. Yniquez Continues To Have Standing Under *Broadrick v. Oklahoma* To Challenge The Overbreadth Of Article XXVIII.

During the course of the District Court proceedings, Kelly Yniguez pursued her claims under the First Amendment to the United States Constitution contending, inter alia, that Article XXVIII was facially overbroad. In so doing, Ms. Yniguez raised arguments as to the unconstitutional application of Article XXVII to third parties. The District Court specifically recognize Yniguez's arguments as to the overbreadth of Article XXVII concluding that those arguments alone supported standing:

> The defendants also argue that standing does not exist in this action because Yniguez's claims run afoul of the prudential standing limitation that a plaintiff generally must assert his or her own legal rights and interests. This issue is raised in response to the fact that Yniguez's assertion of standing is predicated in part on her right to assert the unconstitutionality of Article XXVIII on behalf of third parties not before the court whose rights are allegedly chilled by the overbreath of the Article.
>
> * * * * *
>
> Yniguez has alleged a sufficiently colorable claim that Article XXVIII is overly broad in violation of the First Amendment rights of other Arizona government officials and employees not before the court to confer standing on her even if her own First Amendment rights are not violated by Article XXVIII.

730 F.Supp. 309 at 313, EX, pp.153-154. The District Court ultimately determined that Article XXVIII was facially invalid as overbroad in violation of the First Amendment. The

recognized standing of Yniguez to urge the overbreadth doctrine remains intact. See Fox v. Board of Trustees of the State University of [9] New York, 764 F.Supp. 747, 756 (N.D.N.Y. 1991) (assuming that an overbreadth challenge would operate to defeat a claimed mootness problem on appeal but rejecting that argument because the plaintiffs did not invoke the overbreadth doctrine during the course of their litigation.). Having pursued her claims in the District Court in part on behalf of third parties, Kelly Yniguez retains standing to pursue this appeal. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

## II. SENATOR JAIME GUTIERREZ HAS CONTINUED STANDING TO PURSUE THIS APPEAL.

The undocketed appeal of Senator Jaime Gutierrez was deferred to be consolidated with this appeal in the event of any consideration of the merits of the judgment entered by the District Court. Since Senator Gutierrez timely appealed, and since Senator Gutierrez also urged the overbreadth of Article XXVIII in the District Court, he has standing to continue this appeal.

Moreover, the trial record unequivocally demonstrates that Senator Gutierrez has an independent "heightened interest" in opposing Article XXVIII sufficient to confer standing on him. His interest is essentially identical to that of AOE – an interest deemed by this Court sufficient to justify post-judgment intervention. As is the case for sponsors of ballot initiatives, Arizona law recognizes the interests of initiative opponents and permits them to submit arguments opposing the initiative. See Ariz.Rev.Stat.Ann. §19-124. In fact, Senator Gutierrez did submit such opposition. See EX, p.056.

[10] As a consequence, just as AOE had a "strong interest in the vitality of a provision of the state constitution which they



proposed,"[5] Senator Gutierrez retains a strong interest in opposing that provision. Moreover, the same Article III considerations that led this Court to conclude that Mr. Park personally meets traditional Article III standards also apply to Senator Gutierrez. Under the circumstances, based on Senator Gutierrez' appeal alone, this action is not moot.

## III. THE DISTRICT COURT DECISION SHOULD NOT BE VACATED BECAUSE OF ANY CLAIMED MOOTNESS

Generally, when an appeal is dismissed as moot, the appellate court reverses or vacates the judgment below and dismisses the case. United States v. Munsingwear, Inc., 340 U.S. 36, 39, 71 S.Ct. 104, 106-07, 95 L.Ed. 36 (1950). This practice is, however, subject to several exceptions. One exception is where an appellant has purposely caused dismissal of the appeal as moot. Since a dissatisfied litigant should not be permitted to destroy the consequences of an adverse judgment by eliminating his own right to appeal, in such a case the lower court decision might not be vacated. Under such circumstances, the matter is normally remanded to the District Court to balance competing values and determine whether the judgment should be vacated. Allard v. DeLorean, 884 F.2d 464, 467 (9th Cir. 1989). Here, neither the successful plaintiff nor the only defendant actually aggrieved by [11] the judgment filed any appeal. Thus, the actual parties bound by the judgment were content to permit that judgment to remain binding. Counsel have been unable to locate any similar case permitting post judgment intervention wherein no appeal was filed by the only person bound by an adverse lower court judgment. Under these unique circumstances, in the event of

---

[5] Yniguez v. State of Arizona, 939 F.2d 727, 733 (9th Cir. 1991).

any mootness, this Court should remand the cause to the District Court to determine whether the judgment should remain binding.

Conclusion

Appellee Kelly Yniguez remains a party with a concrete stake in the outcome of this litigation based both upon her unresolved claims for damages and her continued recognized standing to pursue claims for unconstitutional overbreadth. Moreover, the appeal cannot be moot due to the timely and proper appeal by Senator Gutierrez, his unquestioned standing under the overbreadth doctrine and the Article III standing he enjoys similar to that previously found by this Court to exist on behalf of AOE. This Court is respectfully urged to enter an order remanding this cause to the District Court for purposes of the filing of any Notices of Appeal by AOE and Yniguez, without prejudice to consideration of any proposed Amendments as the District Court may find itself advised to allow. Following the filing of any Notices of Appeal, the parties should be directed to coordinate an expedited briefing and hearing schedule with the Clerk of this Court.

[12]

DATED this 12th day of December, 1991.

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Attorneys for Plaintiff-Appellee Maria-Kelly F.Yniguez
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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

Decision Denying Suggestion of Mootness
975 F.2d 646 (9th Cir. 1992)
Filed September 16, 1992
Reprinted in Appendix to Petition for Certiorari
Beginning at Page 93a

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

[Initial Address Omitted]

[Caption omitted]

No. CIV-88-1854-PHX-PGR

**NOTICE OF APPEAL**

Notice is hereby given that Arizonans for official English and Robert D. Park hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the Memorandum Opinion and Order entered in this action on the 6th day of February, 1990, which ordered:

> that Article XXVIII of the Constitution of the State of Arizona is hereby declared to be void as being invalid on its face in violation of the First Amendment of the Constitution of the United States."

and the Judgment entered on the 6th day of February, 1990, which ordered:

> "--- that Article XXVIII of the Constitution of the State of Arizona is declared void as being violative of the Constitution of the United States."

Dated this day of December, 1992.

**MEMORANDUM IN EXPLANATION OF PRECAUTIONARY NOTICE OF APPEAL**

The foregoing notice of appeal is filed within 30 days of November 5, 1992, of an abundance of precaution to protect the record and the interests of Arizonans for official English and Robert D. Park. The notice may be inappropriate for the



following reasons:

The Ninth Circuit Court of Appeals logged the file in this action out of its court on September 30, 1992, and the United States District Court for the District of Arizona received it on November 5, 1992.

The Circuit Court's last opinion was filed September 16, 1992. The record reflects no mandate issuing thereafter.

That opinion recommended any mootness could be cured by (1) plaintiff Yniguez seeking nominal damages, (2) intervention of a new plaintiff whose claim against the operation of the English only provision is not moot, or (3) Yniguez may have standing if other individuals who are affected by the English only provision did not pursue their claims in reliance on Yniguez's pursuit of her own claim.

As of the date of this notice, no such action has occurred. It appears to Arizonans for Official English and Robert D. Park that the claim of plaintiff Yniguez is in fact moot. The Ninth Circuit Court of Appeals' July 19, 1991, Opinion in No. 90-15546 concluded with the statement:

> "We shall retain jurisdiction over the appeal of the District Court's decision on the merits (Page 8983)."

In recognition of the inaction of plaintiff or anyone in her stead to attempt to cure the mootness suggestion, we believe the Circuit Court's two opinions mandate dismissal of the action on mootness grounds and vacation of the District Court's February 6, 1990, Memorandum Opinion and order and Judgment, both of which declared Article XXVIII of the Arizona Constitution in violation of the First Amendment of the Constitution of the United States.

These parties recommend the United States District Court for the District of Arizona forward this action to the Ninth Circuit Court of Appeals with the recommendation it proceed with dismissal of the action for mootness and its

vacation of the Opinion, Order and Judgment entered herein February 6, 1990, by the District Court.
Respectfully submitted this 3rd day of December, 1992.

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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

[Initial Address Omitted]

[Caption omitted]

CIV. No. 88-1854 PHX PGR

**NOTICE OF CROSS-APPEAL**

Notice is hereby given that Maria-Kelly F. Yniguez, plaintiff above-named, hereby cross-appeals to the United States Court of Appeals for the Ninth Circuit from both the final Judgment and Memorandum Opinion and Order entered in this action on the 6th day of February, 1990.
\\\

DATED this 15th day of December, 1992.

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- and -
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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

*En Banc* Decision on the Merits
69 F.3d 920 (9th Cir. 1995)
Filed October 5, 1995
Reprinted in Appendix to Petition for Certiorari
Beginning at Page 1a



**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

MARIA-KELLY YNIGUEZ, et al., )
Plaintiffs, )
vs. )
ROSE MOFFORD, et al., )
Defendants. )
)

No. CIV 88-1854 PHX PGR

**ORDER**

The Ninth Circuit Court of Appeals having issued its mandate on October 27, 1995 remanding this matter for the sole purpose of awarding nominal damages to Maria-Kelly Yniguez,

IT IS ORDERED that plaintiff Maria-Kelly Yniguez is awarded one dollar ($1.00) in nominal damages.

Dated this 3rd day of November, 1995.

Paul G. Rosenblatt
United States District Judge

**SUPREME COURT OF THE UNITED STATES**

64 USLW 3635, 64 USLW 3639

AZ FOR OFFICIAL ENGLISH V. **ARIZONA,** ET AL.
95-974
Supreme Court of the United States
Monday, March 25, 1996

The motion of Equal Opportunity Foundation for leave to file a brief as amicus curiae is granted. The motion of U.S. English, Inc. for leave to file a brief as amicus curiae is granted. The petition for a writ of certiorari is granted. In addition to the questions presented by the petition, the parties are requested to brief and argue the following questions: (1) Do petitioners have standing to maintain this action? (2) Is there a case or controversy with respect to respondent Yniguez?

(13)

No. 95-974

Supreme Court, U.S.
FILED
MAY 22 1996
CLERK

# In The
# Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelley F. Yniguez; Jaime P. Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Writ Of Certiorari to the
United States Court of Appeals for The Ninth Circuit

## BRIEF FOR PETITIONERS

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May 23, 1996

64 pp

## QUESTIONS PRESENTED

Article XXVIII of the Arizona Constitution declares English the official language of the State and requires governmental actions to be taken in English. A State employee sought to write government documents in Spanish. A 6-5 majority of the U.S. Court of Appeals for the Ninth Circuit, *en banc*, declared Article XXVIII unconstitutional because it violated the free speech rights of public employees.

1) Whether a State constitutional provision declaring English the official language of the State and requiring English to be used to perform official acts violates the Free Speech Clause of the First Amendment.

2) Whether a government employee has a Free Speech right to disregard the official language of her employer and choose the language in which to perform official actions.

*3) Do petitioners have standing to maintain this action?

*4) Is there a case or controversy with respect to respondent Yniguez?

*Pursuant to Order of the Court, March 25, 1996

**Rule 14.1 Listing:**

**Petitioners and Respondents:**

Arizonans for Official English

Robert D. Park

State of Arizona

Maria-Kelley F. Yniguez

Jaime P. Gutierrez

Arizonans Against Constitutional Tampering

**Others Listed Below:**

Rose Mofford, Governor of Arizona

Robert Corbin, Attorney General of Arizona

Catherine Eden

Thomas Espinoza

**Rule 29.1 Statement**

Arizonans for Official English is an unincorporated association and has no parents or subsidiaries.



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## OPINIONS BELOW

The majority opinion, concurrences and dissents of the United States Court of Appeals for the Ninth Circuit, *en banc*, (reprinted in the Appendix to the Petition for Writ of Certiorari ("App."), 1a) are reported at 69 F.3d 920 (9th Cir. 1995). The substantially-identical original panel decision, reported at 42 F.3d 1217 (9th Cir. 1994), was withdrawn when *en banc* review was granted. 53 F.3d 1084 (9th Cir. 1995); App. 4a.

A panel decision of the Ninth Circuit denying a suggestion of mootness (App. 93a) is reported at 975 F.2d 646 (9th Cir. 1992). A panel decision of the Ninth Circuit permitting Petitioner to intervene (Joint Appendix ("J.A.") at 157) is reported at 939 F.2d 727 (9th Cir. 1991). A decision of the District Court denying Petitioners' Motion to Intervene (J.A. 138) is reported at 130 F.R.D. 410 (D. Ariz. 1990). The original decision of the United States District Court for the District of Arizona (App. 97a) is reported at 730 F. Supp. 309 (D. Ariz. 1990).

## JURISDICTION

The judgment of the Ninth Circuit, *en banc*, was entered on October 5, 1995. The Petition for a Writ of Certiorari was filed on December 20, 1995, and granted on March 25, 1996. J.A. 212. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

Article XXVIII of the Arizona Constitution, and U.S. Constitution, Amendments I, X, and XIV are reprinted in the Petition for Certiorari, at Pp. vi-viii.



## STATEMENT OF THE CASE

The Arizona Constitution requires official acts to be performed in English. A government employee, claiming the right to execute government documents in a language her supervisor did not understand, challenged the English language requirement under the First Amendment and federal civil rights laws. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1343, and 2201.

This is a "government speech" case, which asks whether government's own rights as a speaker, protected in *Rosenberger v. Rector and Visitors of Univ. Of Va.* ("*Rosenberger*"), __ U.S. __, 115 S.Ct. 2510 (1995) and similar cases, are limited by the speech rights of government employees, protected under *United States v. National Treasury Employees Union* ("*NTEU*"), __ U.S. __, 115 S.Ct. 1003 (1995) and similar cases.

The Court also requested briefing and argument on whether petitioners have standing to maintain this action. Petitioners (the proponents of the initiative which declared English the official language of Arizona) intervened to appeal the declaration that their initiative was void as violating the First Amendment; the State had been dismissed as a party (under the Eleventh Amendment) and the Governor (the only defendant remaining) declined to appeal. This case thus asks whether initiative proponents have standing to defend the constitutionality of their initiative in the absence of a willing and able State defendant.

Finally, the Court requested briefing and argument on whether a case or controversy continues to exist with respect to Respondent Maria-Kelly Yniguez ("Yniguez"). Yniguez left government employment on April 20, 1990, but appealed the denial of an award of nominal damages.

Thus, this case asks whether a claimant whose personal civil rights claim is moot, but whose award of nominal damages as a representative of others is still at issue, maintains a live case. The remaining controversies in this case (the State's liability for nominal damages, initiative opponents' constitutional challenge, and initiative proponents' claim of invasion of their own rights) are still live.

**The Challenge to the Arizona Constitutional Amendment:**

Article XXVIII of the Arizona Constitution ("Art. XXVIII") provides, *inter alia*,[1] that English is the official language of Arizona and that government actions shall be taken in English. Art. XXVIII was added to the Arizona Constitution by initiative in 1988; Petitioners Arizonans for Official English and its Chairman, Robert Park, (together "AOE") were the proponents of the initiative. Appendix to Petition for Writ of Certiorari ("App.") 4a. AOE is an unincorporated political committee which expended more than $300,000 and thousands of hours of volunteer time to promote the passage of its initiative. J.A. 124.

In 1988, Respondent Maria-Kelly F. Yniguez ("Yniguez") was employed by the state to evaluate medical malpractice claims filed against it. J.A. 84. She had

1 Article XXVIII makes three basic language choices. Under Section 3(1)(a), the State must use English for all official acts. Under Section 3(1)(b), government may not force anyone to use a language other than English. Under Section 3(1)(c), government documents must be in English to be effective or enforceable. There are exceptions to each choice in Section 3(2). The courts below ignored all but Section 3(1)(a) - the language choice for government action.



authority to settle claims up to $10,000. *Id.* Her supervisor could not read Spanish. J.A. 88.

As part of the settlement process, Yniguez would draft claim release settlement forms. J.A. 84. Each settlement document was different. *Id.* At least one settlement form was executed only in Spanish. J.A. 91. Yniguez admitted that her supervisor could not read settlement documents in Spanish. J.A. 88.

Yniguez spoke and wrote in Spanish during the performance of her official duties. It was stipulated that "[s]ome of the persons with whom she communicates in the Spanish language also could communicate in the English language, but Kelly [Yniguez] communicates in the Spanish language because the emotive ideas and feelings which she desired to express were, *in her judgement* [sic] *and the exercise of her liberties*, best and most clearly expressed in the Spanish language." Appendix to Yniguez's Opposition to Petition for Cert. ("App. Ynig. Opp. Cert."), 7 (emphasis added). Similarly, Yniguez "has previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public *and private concern.*" *Id.*, 8 (emphasis added).

Yniguez said she used Spanish in her job, *inter alia*, because "[i]t's kind of a solidarity thing", J.A. 86, and so she can express some elements of malpractice claims in Spanish which are impossible to express in English. J.A. 51. Some of the persons to whom she speaks Spanish are attorneys. J.A. 46-47, 50.

Yniguez presented no evidence of any elements of medical malpractice claims she could not express to attorneys in English. App. 84a (Wallace, C.J., dissenting). Yniguez said that inexpressible concepts include her cultural heritage as a Hispanic, the sense of community and

experiences shared by Hispanics, "and other feelings." J.A. 45, 51. She also noted that she speaks Spanish on the job "to demonstrate my belief that Arizona enjoys a pluralistic society." J.A. 45.

Immediately following the enactment of Article XXVIII, Yniguez ceased speaking Spanish in the workplace. J.A. 86. She filed suit pursuant to 42 U.S.C. § 1983, claiming Art. XXVIII infringed her rights under the First and Fourteenth Amendments and federal civil rights laws. J.A. 55. Yniguez filed her lawsuit so she could "go back to drawing up claim release forms in Spanish." J.A. 90.

The State defendants, relying on an Arizona Attorney General's opinion, Ariz. Atty. Gen. Op. I89-009, J.A. 61, responded that Art. XXVIII was constitutional because it applied only to governmental sovereign acts. App. 109a. The State also argued that the State defendants were immune from suit under the Eleventh Amendment. App. 99a.

**The District Court Decision:**

The District Court dismissed all defendants except Governor Mofford. App 99a. The District Court then held Article XXVIII unconstitutional on its face under the First Amendment. App. 112a-13a. The District Court used a "facial overbreadth" analysis, finding that the violation of the First Amendment was substantial, and that there were no conceivable limiting interpretations. App. 109a-10a.

> When read at its full literal breadth, Article XXVIII would force Arizona governmental officers and employees **whose use of a non-English language in the performance of their official duties is protected by the First Amendment**, . . . to either violate their sworn oaths to obey the state constitution, and thereby subject themselves to potential sanctions and private suits, or to curtail **their** free speech rights.



App. 107a (emphasis added).

The District Court did not find that Yniguez had a "First Amendment right to speak a language of her choice during the performance of her official duties." App. 106a. "All the court need find, and all it does find in this regard, is that Article XXVIII is so broad as to inhibit the constitutionally protected speech of third parties." *Id.* The District Court did not issue an injunction because the record showed no substantial threat of irreparable injury to any person. App. 111a-112a.

**Motions for Intervention:**

The sole remaining defendant in the case, Governor Rose Mofford, had been a public opponent of AOE's initiative. J.A. 38-39. Mofford immediately announced she would not appeal the District Court's decision. J.A. 160.

Petitioners Arizonans for Official English and Robert Park ("AOE") filed a Motion to Intervene and a Notice of Appeal ten days after the District Court's decision. J.A. 94. The Attorney General also moved to intervene. The District Court denied both motions, J.A. 148-49.

A Ninth Circuit panel, however, allowed AOE to intervene. J.A. 183. The panel found that AOE had Article III standing to maintain the action because AOE could allege "a threat of particularized injury from the order they seek to reverse that would be avoided or redressed if their appeal succeeds." J.A. 164, 167-68. "The district court's decision striking down Article XXVIII essentially nullified the considerable efforts AOE made to have the initiative placed on the ballot and to obtain its passage." J.A. 167. The panel quoted various Arizona laws giving an initiative

sponsor "official rights and duties distinct from those of the voters at large." J.A. 167.

The panel found that AOE's relationship to Art. XXVIII was "closely analogous to the relationship of a state legislature to a state statute", J.A. 165, 167, rather than that of a "concerned bystander." J.A. 165, *quoting Diamond v. Charles*, 476 U.S. 54, 62 (1986).

The panel also found that AOE met the four criteria for intervention under Fed.R.Civ.P. 24(a). J.A. 171-79. The panel found AOE's right to sue under Art. XXVIII, § 4 was impaired, noting that "[t]he district court's decision casts a cloud over the state's power to enforce Article XXVIII." J.A. 177.

The panel reversed the District Court's denial of AOE's[2] Motion to Intervene, and added: "[w]e shall retain jurisdiction over the appeal of the district court's decision on the merits." J.A. 183-84. AOE's attempts to obtain a briefing schedule for the merits were cut short by the State's Suggestion of Mootness. J.A. 188.

**The State's Suggestion of Yniguez' Mootness and Panel Decision:**

Maria-Kelly Yniguez left state employment on April 20, 1990, prior to oral argument on the intervention appeals.[3] J.A. 187. Yniguez opposed the State's Suggestion

2 The panel partly granted Arizona's motion to intervene under 28 U.S.C. § 2403(b), saying that the Attorney General would not be a "party" to the appeal, but could argue the constitutionality of Art. XXVIII. J.A. 182-83.

3 No notice of Yniguez' departure from government employment was given to the Ninth Circuit or to AOE, according to Yniguez' counsel, because "legal research disclosed that this case was not moot." J.A. 96 n. 2. *But see, Board of License Commissioners of the Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985)(duty of counsel to inform court "without delay" of any development which may conceivably affect the outcome).



of Mootness because she was appealing the denial of an award of nominal damages, J.A. 197, and because her "claim on the overbreadth doctrine was sufficient to confer standing on her even if her own First Amendment rights are not violated by Article XXVIII." J.A. 195.

The Ninth Circuit panel rejected the Suggestion of Mootness, holding that Yniguez could appeal the denial of nominal damages. App. 94a-95a. The panel also remanded the case to the district court. *Id.*, n. 3. The panel said: "[t]he district court may now proceed to allow the parties to perfect their appeals and to conduct further proceedings in conformity with our dispositions." *Id.*; App. 96a.

There was some confusion over further proceedings in the case. "Although for some reason no mandate issued thereafter, the district court received the case back on November 5, 1992, and [AOE] timely filed its notice of appeal within thirty days of that date." App. 10a n. 8; J.A. 206. Yniguez cross-appealed the denial of nominal damages. J.A. 209.

In December 1994, a Ninth Circuit panel, in an opinion by Judge Reinhardt, struck down Article XXVIII as "facially overbroad" because it "violates the First Amendment . . . in its entirety." 42 F.3d 1217, 1243 (9th Cir. 1994). The panel also permitted Arizonans Against Constitutional Tampering ("ACT") to intervene. App. 10a.[4]

4 ACT, a political committee including current state employees, had opposed AOE's initiative. App. 10a-11a. ACT unsuccessfully

Rehearing *en banc* was granted. 53 F.3d 1084 (9th Cir. 1995).

**The 6-5 *En Banc* Decision:**

On October 5, 1995, the Ninth Circuit, *en banc*, ruled 6-5 that Article XXVIII was unconstitutional under the First Amendment. App. 60a. Judge Reinhardt again wrote the opinion. The *en banc* majority opinion was substantially identical to the withdrawn panel opinion. App. 4a.

The majority held that the Arizona Attorney General's interpretation of Art. XXVIII was not justified by its text, App. 17a, and that abstention was not proper where an Arizona court[5] has already reviewed Art. XXVIII "and has done nothing to narrow it." App. 19a-20a. The majority also held that facial overbreadth analysis was proper because "[t]he speech rights of all of Arizona's state and local employees, officials, and officers are thus adversely affected in a potentially unconstitutional manner by the breadth of Article XXVIII's ban on non-English **governmental speech**." App. 23a (emphasis added). The majority then held that choice of language was speech "alone," App. 31a, and that the requirement that official acts be

challenged Art. XXVIII in state court. *Ruiz v. Arizona*, No. CV-92-19603 (Sup. Ct. Maricopa County, January 26, 1994). An appeal is pending.

5 Two state courts have upheld Article XXVIII. In *Robles v. Mofford*, No. 261837, (Sup. Ct. Pima County), Nov. 14, 1989, Judge Hannah dismissed a First and Fourteenth Amendment challenge to Article XXVIII. In *Ruiz v. Arizona*, No. CV-92-19603 (Sup. Ct. Maricopa County, January 26, 1994), Judge Cates found, *inter alia*, that "Article XXVIII is content-neutral, and therefore does not violate the First Amendment."



performed in English was "invidious, discriminatory, or, at the very least, wholly insufficient" to support a restriction on speech. App. 34a.

Then the majority turned to the free speech rights of government employees and found "[h]ere the speech does not fit easily into any of the categories previously established." App. 38a. "[I]t is enough to note that the fact that the speech occurs as a part of the performance of the employee's job functions affects the nature of our analysis but does not necessarily determine its outcome." App. 40a.

The majority was concerned that Article XXVIII "significantly interferes with the ability of the non-English-speaking populace of Arizona 'to receive information and ideas'", *quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976). App. 43a. Choice of language "is unquestionably of public import" because "[i]t pertains to the provision of governmental services and information." App. 41a.

The majority completed its analysis by finding that Art. XXVIII supports **no** state interests, App. 45a-56a, and that "the adverse impact of Article XXVIII's overbreadth is especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Hispanics and other national origin minorities." App. 56a. "The Arizona restriction on language provides no encouragement [to learn English], however, only compulsion; as such, it is unconstitutional." App. 59a.

The majority dealt with the dissents' government speech analyses in a footnote. App. 40a-41a, n. 24. The footnote found the government speech cases "simply irrelevant here" because the majority thought the cases dealt only with "power to regulate government-subsidized speech of **private parties**." App. 40a (emphasis added).

The majority also "disapproved" *Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3* ("*Guadalupe*"), 587 F.2d 1022, 1027 (9th Cir. 1978), which had said that choice of language in government is a political question. App. 54a, n. 31.

Judge Brunnetti concurred to emphasize "that the Article's unconstitutional effect on Arizona's elected officials would alone be sufficient reason to strike the provision down." App. 62a.

Judge Reinhardt wrote a special concurrence to his own majority opinion to respond to Judge Kozinski's dissent. "The end result of Judge Kozinski's legal approach would be to punish people who are not as fortunate or as well educated as he – people who are neither able to write for nor read the *Wall Street Journal*, and indeed would have little cause to do either." App. 69a.

**The Dissents:**

Judge Fernandez wrote the principal dissent, concluding that Article XXVIII did not violate the First Amendment. Judge Fernandez found this case at the confluence of three "lines of argument":

> the state has a right to control the content and mode of its own speech;
>
> employee speech can be regulated; and
>
> the general public does not have a constitutional right to have the State provide services in any particular language. App. 81a.

Citing *Rosenberger*, Judge Fernandez wrote: "It is well-settled that the State has the right to control what it is paying for; it can control what is said by those acting on its behalf." App. 77a. Judge Fernandez listed other opinions (including one by Judge Reinhardt) in which employers were able to control employees' languages. App. 78a.



Judge Fernandez cited *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)("The power of the State to . . . make reasonable regulations for all schools, *including a requirement that they shall give instructions in English*, is not questioned.")(emphasis by Judge Fernandez). "Certainly, if the State can require teaching in a particular language, it can itself choose to use a particular language to express the content of what it has to say." App. 79a.

Judge Fernandez also said that choice of language is a "mode of expression," like "sound trucks and fighting words," which can be regulated. *R.A.V. v. City of St. Paul*, __ U.S. __, 112 S.Ct. 2538, 2545 (1992)("[e]ach . . . is a 'mode of speech'. . .; both can be used to convey an idea, but neither has, in and of itself, a claim upon the First Amendment"). Judge Fernandez found no protection for choice of language either as a mode of expression or for its content. App. 79-80a. "The language does not, in the sense used here, change the content at all." App. 75a.

Judge Fernandez also quoted extensively from *Guadalupe*, 587 F.2d at 1027 ("Whatever may be the consequences, good or bad, of many tongues and cultures coexisting within a single nation-state, . . . [their validity] cannot be determined by reference to the Constitution. . . . Such matters are for the people to decide."). App. 83a.

Chief Judge Wallace joined in Judge Fernandez's dissent, but wrote separately to note that "mere regulation of government employees' mode of speech does not implicate the First Amendment or require the various balancing tests which the majority employs." App. 83a. Chief Judge Wallace also said that "[c]ontrary to precedent, the majority rules that if members of the public would like to re-

ceive public employees' speech in a certain way, that desire constitutes a matter of public concern." App. 85a.

Judge Kozinski also dissented separately, finding that the majority opinion had created a new right for government employees to "force their employer into federal court and make it prove, to the exacting standard of the First Amendment, that its interest in enforcing its laws outweighs their right not to make statements they find objectionable." App. 86a.

Judge Kozinski continued: "The fault [with the majority theory] lies in the rule's central premise – the dangerous notion that government employees have a personal stake in the words they utter when they speak for the government. The force of this idea will turn government employment into a platform for endless attacks on government policy and governance into a tug of war between those who make the laws and those who enforce them." App. 89a.

Judge Kozinski also noted that "there's nothing unusual about Yniguez's situation, nothing unusual about her claim. The same sort of challenge could be raised by just about every disgruntled government employee." App. 87a.

Judge Kozinski offered several examples of government employees who might disagree with their employers' positions. App. 87a-88a. Judge Kozinski predicted that "when confronted with what will come to be known as an Yniguez challenge, states, cities, counties, even the federal government, will have to prove that their laws are worth the candle; **courts will routinely make judgments traditionally reserved for the legislatures and the people themselves**." App. 89a (emphasis added).



**Post-Decision Activities:**

Yniguez later filed an Application for Attorneys' Fees and costs totalling some $175,000. AOE opposed the Application because attorney's fees should be imposed against losing intervenors "only where the intervenors' action was frivolous, unreasonable, or without foundation." *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989). Yniguez responded that *Zipes* does not apply because "AOE became a person acting under color of Arizona law when it intervened." Yniguez's Reply to State's Objection to Application for Attorney's Fees, 2 n. 2. The Application is pending.

On November 7, 1995, the District Court awarded Yniguez $1 in nominal damages. J.A. 211.

AOE filed its Petition for Writ of Certiorari on December 20, 1995. The Petition was granted on March 25, 1996, in an order adding two additional questions (AOE's standing and Yniguez's case or controversy) for briefing and argument. J.A. 212.

## SUMMARY OF ARGUMENT

Concerned about fiscal burdens, program failures, and political complexities, many states have opted to use English in their internal operations, except in limited circumstances. Courts have uniformly rejected complaints about such choices. The decision below changed that settled law, vesting governments' language choice in the courts.

This case examines government's rights as a **speaker**. The government, as speaker, may choose the content of its message, and ensure that its message is not distorted by the mode of delivery. Neither recipients of government services nor government employees can force the government to include a message not of its choosing.

Government's speech right is not unlimited and must not be irrationally or arbitrarily exercised. Courts have uniformly held, however, that governments' decisions to use English in internal operations are rational. Thus, if government's choice to use English is "speech alone," as held below, it is the government's speech, which does not violate the First Amendment. If government's choice of language is not speech, then government may require use of English to insure that its message is not distorted by someone else's delivery. The lower court, which ignored these principles, must be reversed.

Even if Arizona's use of English affected its employees, that choice does not violate the First Amendment. Arizona's use of English in its workplace is a policy decision furthering legitimate structural, functional and societal interests, not an employment-related decision. As an employer, Arizona is entitled to substantial deference in regulating its own speech.



Article XXVIII is content-neutral, and protects important government interests in supervision, efficiency and effectiveness, accuracy and the preservation of unity. On the other hand, public employees have no First Amendment rights in the choice of language for official acts. Even if there were any such rights, the government's interests in its own language choice outweigh any competing interests. Since Art. XXVIII is content-neutral and supports substantial governmental interests, it should have been upheld.

Petitioner Arizonans for Official English has standing to maintain this case both as a representative of the enactors of Art. XXVIII and to protect its own political rights. The people of Arizona can enact legislation and should have the right to representation when the State declines or is unable to represent them. As the legally-recognized proponent of Art. XXVIII, AOE is an appropriate representative for the enactors. Similarly, AOE has standing to protect its own rights granted by state and federal law.

Whether or not respondent Yniguez maintains a case or controversy on her personal claims, the case remains live because of the continuing controversies between the other parties. ACT may continue its challenge to Art. XXVIII against the State and AOE; AOE and the State may defend against the challenge. AOE may also protect its political and statutory rights against the State and government employees (such as those represented by ACT and Yniguez). And the State retains the right to challenge the imposition of nominal damages against it.

The decision below must be reversed.

## ARGUMENT

### I. LANGUAGE IN GOVERNMENT IS A POLITICAL CHOICE, REVIEWED UNDER THE STANDARD APPLICABLE TO GOVERNMENT AS A SPEAKER

#### A. Choice of Language in Government Is a Highly-Active Political Question.

Until the decision below, courts have uniformly held that choices about which languages are to be used by government in its internal operations should be made by the political branches:

> Whatever may be the consequences, good or bad, of many tongues and cultures coexisting within a single nation-state, whether the children of this Nation are taught in one tongue and about primarily one culture or in many tongues and about many cultures cannot be determined by reference to the Constitution. We hold, therefore, that the Constitution neither requires nor prohibits the bilingual and bicultural education sought by the appellants. Such matters are for the people to decide.

*Guadalupe*, 587 F.2d at 1027; *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973)(California's choice to deal only in English in the provision of forms and services has a reasonable basis); *Alfonso v. Board of Review*, 89 N.J. 41, 444 A.2d 1075, 1077, *appeal dismissed and cert. denied*, 459 U.S. 806 (1982)("The decision to provide translation, encompassing as it does the determination of when a translation should be provided, and to whom, and in what language, is one that is best left to those branches of government that can better assess the changing needs and



demands of both the non-English-speaking population and the government agencies that provide the translation.").

One reason for courts' deference to the political branches is the sheer number of languages confronting policymakers. 322 languages were spoken in the United States in 1990. U.S. Bureau of the Census, 1990 Table: "Language Spoken at Home and Ability to Speak English for Persons 5 Years and Over."

> Arizonans speak dozens of languages, enriching the lives of all its citizens, but complicating decisions about governmental services. For example, how could Arizona respond to service requests in Spanish and not in several of the native American languages that so enrich the State? Arizona would have to either print documents in numerous languages or provide instantaneous translation. This could be an enormous burden, and courts have consistently refused to order such language assistance.

Brief Amicus Curiae of Arizona Legislators in Support of Petition for Certiorari, 3; *Vialez v. New York City Housing Auth.*, 783 F.Supp. 109, 124 (S.D.N.Y. 1991)("Nothing could be fairer than to apply the English language uniformly to all tenants of whatever national origin.").

But perhaps most important is the difficulty of deciding whether it is better in the long run to provide services in languages other than English or to encourage the learning of English.[6] Some misguided government programs, for example, may actually block immigrants from acquir-

6 "Give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime." *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140, decided May 13, 1996, slip op. 25 (Stevens, J., joined by Kennedy, Thomas and Ginsburg, JJ.).

ing English. "A Bilingual Prison," *The New York Times*, September 21, 1995, A22 ("a system that dragoons children into bilingual programs that reinforce the students' dependency on their native language and then makes escape impossible."); Susan Headden, "Tongue-tied in the Schools," *U.S. News & World Report*, September 25, 1995, 44 ("[bilingual education] was born of good intentions, but today it has mushroomed into a $10 billion-a-year bureaucracy that not only cannot promise that students will learn English but may actually do some children more harm than good.").

In light of these concerns, twenty-one states have chosen to use English as their official languages.[7]

Courts have uniformly rejected attempts to force government or employers to use languages other than English. *See, e.g., Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1994), *cert. denied*, __ U.S. __, 114 S.Ct. 2726

7 **Alabama**: Ala. Const. Amend. 509 (1990); **Arizona**: Ariz. Const. Art. XXVIII (1988); **Arkansas**: Ark. Stat. Ann. 1-4-117 (1987); **California**: Cal. Const. Art. III, § 6 (1986); **Colorado**: Colo. Const. Art. II, § 30 (1988); **Florida**: Fla. Const. Art. II, § 9 (1988); **Georgia**: Ga. Code Ann. § 50-3-30 (1986); **Hawaii**: Hawaii Const. Art. XV, § 4 (1978; Hawaiian is second language); **Illinois**: Ill. Rev. Stat. Ch. 1, § 3005 (1969); **Indiana**: Ind. Code Ann. § 1-2-10-1 (1984); **Kentucky**: Ky. Rev. Stat. § 2.013 (1984); **Mississippi**: Miss. Code Ann. § 3-3-31 (1987); **Montana**: Mont. Code Ann. § 1-1-510 (1995); **Nebraska**: Neb. Const. Art. I, § 27 (1920); **New Hampshire**: 1995 N.H. Laws 157 (1995); **North Carolina**: N.C. Gen. Stat. Ch. 145, § 12 (1987); **North Dakota**: N.D. Cent. Code, § 54-02-13 (1987); **South Carolina**: S.C. Code Ann. § 1-1-(696-698) (1987); **South Dakota**: S.D. Codified Laws Ann. §§ 1-27-20 to 1-27-26 (1995); **Tennessee**: Tenn. Code Ann. § 4-1-404 (1984); **Virginia**: Va. Code § 22.1-212.1 (1950); **Wyoming**: Wyo. St. 8-6-101 (1996; enacted since the Petition was filed).



(1995)(employer entitled to require English on the job; EEOC regulations presuming English-on-the-job rules discriminatory struck down as *ultra vires*); *Toure v. United States*, 24 F.3d 444 (2nd Cir. 1994)(no right to government notices in French); *Vialez v. New York City Housing Auth.*, 783 F.Supp. at 120-24 (surveying cases and stating "To accept plaintiff's contention that as a constitutional – rather than legislative – matter, plaintiff has a right to have certain documents written in Spanish would place an insurmountable and unjustified burden on the Housing Authority.").

The decision below changed that settled law. Judge Reinhardt, writing in a footnote for the six-judge majority below, "disapprove[d], however, the part of *Guadalupe Organization* on which the dissent relies," App. 54a n. 31, and held that a government employee has a First Amendment right to ignore a State's choice to use English.

### B. The Standard for First Amendment Review of Arizona's Use of English for Its Own Operations Is of Government As Speaker.

The lower court held this is a First Amendment case because choice of language involves "speech alone." App. 31a. Assuming *arguendo* that government's choice to use English is "speech," the standard for review in a given circumstance depends on whether the government is acting as sovereign, as employer, or as speaker.

Where government acts as a sovereign, the standard for review of its actions is very high. *Waters v. Churchill*, __ U.S. __, __, 114 S.Ct. 1878, 1885-87 (1994). Where the government acts as employer, however, it "has far broader powers". *Id.*, __ U.S. at __, 114 S.Ct. at 1886.

Art. XXVIII, by its terms, directly affects only government. "As the official language of this State, the Eng-

lish language is the language of the **ballot**, the **public schools** and all **government** functions and actions." Art. XXVIII, § 1(2). (emphasis added). Art. XXVIII applies to government employees, for example, only "**during the performance of government business**". § 1(3)(a)(iv) (emphasis added). Thus, this case asks whether anyone can force the government, **as a speaker**, to express a message not of its choosing. *See, e.g., Hurley v. Irish-American Gay Group of Boston*, ___ U.S. ___, ___, 115 S.Ct. 2338, 2343 (1995)("We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment. We hold that it does").

The standard for review when government is the speaker is whether the government's choice is "so irrational that it may be branded 'arbitrary'. . ." *Kelley v. Johnson*, 425 U.S. 238, 248 (1976). Even the prohibition against viewpoint discrimination "does not restrict the University's own speech, which is controlled **by different principles**." *Rosenberger v. Rector and Visitors of Univ. of Va.* ("*Rosenberger*"), __ U.S. __, __, 115 S.Ct. 2510, 2519 (1995)(emphasis added). Courts have uniformly found that government choices to use English are rational. *See, e.g.*, Pp. 27-28, *infra*.

## II. ARIZONA MAY CHOOSE THE LANGUAGE IN WHICH IT WILL SPEAK.

### A. Arizona May Speak English Without Offending the First Amendment.

The State can choose its own message when it is the speaker. "The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling **its own expression or that of its agents**." *Columbia Broadcasting Sys-*



*tem, Inc. v. Democratic National Committee*, 412 U.S. 94, 139 n. 7 (1973)(Stewart, J., concurring)(emphasis added).

Last Term, this Court said that "when the State is the speaker, it may make content-based choices." *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2518-19. Similarly, "we have permitted the government to regulate the content of what is or is not expressed when **it is the speaker** or when it enlists private entities to convey its own message". *Id.*, (emphasis added), *citing Rust v. Sullivan*, 500 U.S. 173, 192-196, (1991). *See also, Rosenberger*, __ U.S. at __, 115 S.Ct. at 2548 n. 11 (Souter, J., dissenting)("The Court draws a distinction between a State's use of public funds to advance its own speech and the State's funding of private speech, suggesting that authority to make content-related choices is at its most powerful when the State undertakes the former. I would not argue otherwise.").

Thus, if choosing a particular language for a **government** action is "speech alone," App. 31a, it is the **government's** speech. Since Arizona may control its own speech, it should be able to speak English without offending the First Amendment.

On the other hand, if choosing a language is not speech or is only a mode of conveying speech, like sound trucks or fighting words, *R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S. Ct. 2538, 2545 (1992)(modes of speech have no claim on the First Amendment), government may ensure that its message is neither "garbled nor distorted" by those it pays to speak for it. Since Arizona may ensure that its message is not affected by the mode of delivery, Arizona may speak English without offending the First Amendment. Either way, Art. XXVIII must be upheld.

The majority opinion below limited the government speech doctrine to "government-subsidized speech of **pri-**

**vate parties**". App. 40a n. 24 (emphasis added). *Rosenberger* did address private parties' speech: "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is **neither garbled nor distorted** by the grantee." *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2519 (emphasis added).

But limiting government's speech rights **only** to private parties suggests that government can control private parties' speech **but not its own**. That position is inconsistent with government's rights "when **it** is the speaker". *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2518 (emphasis added). Under the lower court's analysis, Arizona could have had more control over its own speech if it had subcontracted Yniguez' duties to a third party. *Cf., Heiser v. Umbehr*, No. 94-1654, *argued* Nov. 28, 1995.

### B. Employees Have No Rights to Dictate Their Employers' Choice of Language, Even If Their Employer Is A State:

The court below suggested that the First Amendment rights of public[8] employees could be used to force the

8 An employee in the private sector has no right to force language choice on an employer. *See, e.g., Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 2726 (1994)(EEOC rules against English-on-the-job policies struck down as *ultra vires*); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987)(employer could require radio announcer to use English); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)(employer could require use of English by bilingual employee); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)(same for non-English-speaking employee).



government to express the employees' personal messages. App. 34a. This suggestion would reverse settled law.

> Appellees' status as public employees, however, gives them no special constitutional right to a voice in the making of policy by their government employer. . . Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues. Indeed, in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-466 (1979), the Court rejected the suggestion. . . . Disagreement with public policy and disapproval of officials' responsiveness . . . is to be registered principally at the polls.

*Minnesota State Board for Community Colleges v. Knight* ("*Minnesota*"), 465 U.S. 271, 285-86 (1984).

Government employees' inability to dictate government policy does not mean they have no First Amendment rights, only that their employment rights are not relevant to setting policy. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 n. 4 (1990)("These are interests the government might have in the structure and functioning of society as a whole. That the government attempts to use public employment to further such interests does not render those interests employment-related.").

Thus the government may restrict its employees' and agents' expression to avoid the appearance of its endorsement or imprimatur. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988)(school district may insure that it is not associated with speaker's views or with any position on matters of political controversy). *See, also, id.*, 484 U.S. at 288-89 (Brennan, J., dissenting)(agreeing

that the risk of erroneous attribution of views to the school might justify some restrictions on expression).

This Court has recognized the speech rights of government employees — but not when the speech was the performance of their duties. This Court recently rejected rules that penalized government employees for activities off the job, but carefully noted that the employees sought "compensation for their expressive activities **in their capacity as citizens, not as Government employees**." *United States v. National Treasury Employees Union* ("*NTEU*"), __ U.S. __, __, 115 S.Ct. 1003, 1012 (1995)(emphasis added).

> With few exceptions, the content of respondents' messages has nothing to do with their jobs and does not even arguably have any adverse impact on the efficiency of the offices in which they work. They do not address audiences composed of co-workers or supervisors; instead they write or speak for segments of the general public. Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.

*NTEU*, __ U.S. at __, 115 S.Ct. at 1012.

None of those conditions applies here. Yniguez is attempting to distort *NTEU* to say that Arizona must pay her for her private statement of belief in pluralism.

Thus, at least in the course of performing their jobs, public employees do not have First Amendment rights of the novel sort asserted in this case. That is because the speech they utter during the performance of their official duties is not their own – it is the government's speech.



### C. Arizona Can Use English Without Offending Someone Else's First Amendment Rights.

The court below also suggested that the First Amendment rights of those who sought government services could combine with government employees' speech rights to block government from speaking English. App. 44a-45a. This amazing proposition suggests that "free speech" includes the **right to deny freedom of speech to others** – in this case, the government.

The case law does not support this expansion of "free speech." "The First Amendment is a limitation on government, and not a grant of power." *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. __, __, 112 S.Ct. 2711, 2716 (1992)(Kennedy, J., concurring).

This Court has repeatedly held that a government may take and promote a position without infringing the rights of persons who disagree or wish to exercise their own free speech rights. *Maher v. Roe*, 432 U.S. 464, 474 (1977)(State may favor childbirth over abortion and allocate public funds to implement that judgment); *Webster v. Reproductive Health Services*, 492 U.S. 490, 510 (1989)(if state can allocate funds to implement value judgment, it may also allocate other public resources, such as staff); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)(legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right), *quoting, Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983)(First Amendment rights to petition government do not require government to provide tax deduction).

As this Court said in *Rust v. Sullivan*, "[p]etitioners' assertions ultimately boil down to the position that if the government chooses to subsidize one protected right, it

must subsidize analogous counterpart rights. But the Court has soundly rejected the proposition." 500 U.S. at 194.

What the government may do through funding, it may also do by allocating staff and other public resources. *Webster*, 492 U.S. at 510.

Thus, Arizona may make a language choice for official actions, ignore other choices, subsidize its choice by allocating resources and staff, and choose to allocate resources to the use of other languages only in certain situations. That is exactly what Article XXVIII does. Arizona's allocation of staff to convey its speech does not offend anyone's First Amendment rights, and the decision below must be reversed.

### D. Arizona's Choice to Use English Does Not Violate Any Limits on Government Speech

Judge Reinhardt's "special concurrence" vehemently opposed the government speech doctrine because government might insist on "racist or abhorrent" speech. App. 68a (Reinhardt, J., specially concurring). "It would not matter whether government had a legitimate purpose or even whether it had a purpose at all." *Id.* This analysis overlooks the limits on government speech.

Protections against abhorrent or racist government speech do not arise from the First Amendment, but from other guarantees. For example, the prohibition against viewpoint discrimination does not restrict government's "speech, which is controlled by different principles." *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2519.

#### *1. Government Speech Has Limits.*

This Court uses a rationality test to review government speech. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974)(city may restrain content in advertise-



ments on city buses if the restrictions are not arbitrary, capricious or invidious); *Kelley v. Johnson*, 425 U.S. at 248 ("a State's restrictions upon its employees must not be so irrational that they may be branded arbitrary.").

Government's speech may "advance certain **permissible** goals." *Rust*, 500 U.S. at 194 (emphasis added). In *Rust*, the question was whether the government could prohibit abortion counseling and referral in programs it funds. Although many people find abortion as important as Yniguez's belief that Arizona is a pluralistic society, this Court upheld a limit on abortion counseling and referral.

#### *2. Courts Have Found That Governmental English Requirements Are Neither Arbitrary Nor Irrational.*

Art. XXVIII, like many requirements that government use English, is well within any limits on government speech. App. 81a-83a (Fernandez, J., dissenting). In *Soberal-Perez v. Heckler*, 717 F.2d 36 (2nd Cir. 1983), for example, the Second Circuit found no constitutional objection to government notices in English:

> We need only glance at the role of English in our national affairs to conclude that the Secretary's actions are not irrational. Congress conducts its affairs in English, the executive and judicial branches of government do likewise. In addition those who wish to become naturalized United States citizens must learn to read English. 8 U.S.C. § 1423 (Supp. 1978) . . . Given these factors, it is not irrational for the Secretary to choose English as the one language in which to conduct her official affairs.

717 F.2d at 42-43.

The Second Circuit recently reaffirmed its position in *Toure v. United States*, 24 F.3d 444, 446 (2d Cir.

1994)(per curiam)(no right to government notices in French – applying "the broadly stated and thoroughly sensible ruling in *Soberal-Perez*"). In *Guadalupe* (the opinion "disapproved" by the court below), the Ninth Circuit said that language choice in education was a "quintessentially 'legitimate' state interest." 587 F.2d at 1027. Earlier the Ninth Circuit said that "the choice of California to deal only in English [in the provision of forms and services] has a reasonable basis." *Carmona v. Sheffield*, 475 F.2d at 739. In *Frontera v. Sindell*, 522 F.2d 1215, 1218 (6th Cir. 1975), the Sixth Circuit held that the State had a "compelling state interest" in giving a civil service exam for carpenters in English. State courts agree. *Castro v. California*, 2 Cal.3rd 223, 242; 466 P.2d 244 (1970)("the state interest in maintaining a single language system is substantial."); *Commonwealth v. Olivio*, 369 Mass. 62, 337 N.E.2d 904, 911 (1975)("This is not an officially multilingual country, and notification of official matters in the sole official language of both this nation and this Commonwealth is patently reasonable").

Thus, requiring government to use English is not so irrational that it violates the limits on government speech.

### E. The Decision Below Violates These Principles, Federalizes Local Questions, And Should Be Reversed.

Until the decision below, the Ninth Circuit honored these government speech principles. Now, however, the standard for reviewing government speech has changed to a balancing test between the rights of the government and the employee. App. 56a. And, unlike the courts which uniformly found governments' choices to use English to be reasonable, Judge Reinhardt suggested that "there would



be nothing on the non-free speech[9] side of the scale" to justify government's use of English. App. 47a.

The government would no longer have the right to make rational "content-based choices", *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2519, and many state and federal policy decisions will be open to challenge.

When it joined the Union, for example, Arizona pledged that its schools would be conducted in English and that its legislators would know English. Act of June 20, 1910, c. 310, 36 Stat. 557, 68-79; ARIZ. CONST., Article XX, §§ 7, 8. Both of these requirements are now vulnerable to challenge, as are Arizona's statutes which require students to be taught English as rapidly as possible. Ariz. Rev. Stats. Ann. § 15-754. The lower court also puts at risk States' choices to use more than one language, such as New Mexico's requirement that teachers know both English and Spanish. N.M. Const. Art XII, § 8 (1911).

Similarly at risk are federal naturalization laws, which have long required most applicants for citizenship to demonstrate an understanding of English, 8 U.S.C. § 1423(a) (Supp. 1996), and a requirement that illegal immigrants seeking amnesty must learn English. 8 U.S.C. § 1255a(b)(1)(D). Several provisions relating to English language proficiency in current congressional proposals to reform immigration laws also would be vulnerable. *See, e.g.*, CONG. REC. (daily ed.), March 20, 1996, H2533-34 (requirement that "diversity" immigrants speak English).

Nor are language-related statutes the only area in which government employees could challenge government

9 Under this Orwellian analysis, "free speech" includes the right to block government from speaking English; "non-free speech" refers to the government's use of English. *See*, P. 25, *supra*.

choices on First Amendment grounds. An employee who opposes affirmative action, for example, could refuse to abide by government's choices on contract or student selection. A teacher who disagrees with a school's curriculum on evolution could insist on teaching scientific creationism as an alternate explanation for life's diversity. And a teacher could insist on teaching in English even if the State wanted her to teach in another language. In each case, the employee would have as much right as Yniguez to challenge choices made by government.

Judge Reinhardt suggested that similar examples were "absurd. **No court** in this country would protect a government employee who adopted one of the outlandish stances". App. 70a (Reinhardt, J., specially concurring)(emphasis added). Regarding evolution as a theory, however, is no more absurd than speaking a particular language on the job to express multiculturalism. *See, e.g., Peloza v. Capistrano Unified School Dist.*, 37 F.2d 517, 525 (9th Cir. 1994)(Poole, J, dissenting and concurring)(teacher's concerns about teaching evolution as fact rather than theory require balancing free speech rights against the Establishment Clause). And at least one teacher has sued for the right to teach in English in Puerto Rico. *Smothers v. Benitez*, 806 F.Supp. 299 (D.P.R. 1992).

But the real problem is that governments would have to go to court to defend every policy judgment. Any employee could force the government to show, "to the exacting standard of the First Amendment," App. 86a (Kozinski, J., dissenting), that its interest in enforcing its laws outweighs the individual's right to personal expression. Public policy would no longer be "registered principally at the polls," *Minnesota*, 465 U.S. at 285, but at the bar.



Ultimately, the majority decision below will substitute federal judicial decisionmaking for local political judgements. This change will violate the Tenth Amendment.

As this Court noted over a century ago: "To [the States] nearly the whole charge of interior regulations is committed or left." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869). Like the choice of location of its own State Capitol, the language a State uses in its internal affairs is a "function essential to [the State's] separate and independent existence. . ." *Coyle v. Oklahoma*, 221 U.S. 559, 595 (1911).

Throughout American history, this Court has permitted States to use various languages. *Patterson v. De La Ronde*, 8 Wall 292, 299-300 (1869)(court reconciled French and English versions of Louisiana mortgage law); *Meyer v. Nebraska*, 262 U.S. at 402 ("The power of the State to . . . make reasonable requirements for all schools, including a requirement that they shall give instructions in English, is not questioned.").

Prior to the Constitutional Convention, the primacy of English was established. "[T]he English language dominated all public life. It was the only official language and as such was used in the courts, the assemblies, and the press." J.R. Pole, *Foundations of American Independence: 1763-1815*, 18, (1972). Under this Court's recent decisions, the Tenth Amendment protects the reservation of these "original powers" of a State to use English in its internal operations. *U.S. Term Limits v. Thornton*, __ U.S. __, __, 115 S.Ct. 1842, 1854 (1995).

Here the State chose to use English. Yniguez, "in her judgement and the exercise of her liberties," App. Ynig. Opp. Cert. 7, chose to speak for the State in another language. Why should a government employee be able to ig-

nore the State's choice? Under this Court's decisions, she does not have the right to choose — the State does. Under the decision below, these rights are reversed.

Art. XXVIII is a limitation on Arizona's own speech. Arizona's choice to use English in its internal operations was no more arbitrary than the Secretary's identical decision in *Soberal-Perez v. Heckler*, 717 F.2d at 43. No constitutionally protected conduct is reached by Art. XXVIII. Since there is no risk of chilling protected speech when government uses English, facial overbreadth was not established, and the decision below must be reversed.

## III. AS AN EMPLOYER, ARIZONA CAN USE ENGLISH IN ITS WORKPLACE.

### A. Government Employees' Speech May Be Regulated On the Job.

The government as employer has broad powers to regulate speech in its workplace. *Waters*, __ U.S. at __, 114 S.Ct. at 1886.

Members of the public may not be sanctioned for using offensive words, *Cohen v. California*, 403 U.S. 15, 24-25 (1971), but government employees may be barred from using the same words. *Waters*, __ U.S. at __, 114 S.Ct. at 1886. The remedy for offensive speech by the public is more speech, *Whitney v. California*, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring), but a government manager may tell a government employee to stop using certain speech. *Waters*, __ U.S. at __, 114 S.Ct. at 1886. Although speech among the public should be robust and uninhibited, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), a governor may fire a high-ranking deputy for inappropriate speech. *Waters*, __ U.S. at __, 114 S.Ct. at 1886, *citing Branti v. Finkel*, 445 U.S. 507, 518 (1980).



Government may prohibit its employees from being "rude to customers." *Waters*, __ U.S. at __, 114 S.Ct. at 1886. Government employees' speech or conduct otherwise protected by the First Amendment can be proscribed if it impedes or disrupts the performance of official duties. *Broadrick v. Oklahoma*, 413 U.S. 601, 614-15 (1973). Government employees may be fired for speech that promotes private concerns. *Connick v. Myers*, 461 U.S. 138, 147 (1983). Even core political speech can be completely proscribed for government employees on the job. *Broadrick*, 413 U.S. at 616-17.

Similar limits exist on other constitutional rights of public employees. For example, this Court refused a Fourteenth Amendment claim by a policeman that he not have to cut his hair. *Kelley v. Johnson*, 425 U.S. 238, 245-46 (1976). The dissent argued that the regulation would affect the policeman's "attitude and lifestyle. In taking control over a citizen's personal appearance, the government forces him to sacrifice substantial elements of his integrity and identity as well." 425 U.S. at 250-51 (Marshall, J., dissenting). Yet this Court said federal courts are not "in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles." 425 U.S. at 248.

These powers over government employees stem from government's mission as employer. *Waters*, __ U.S. at __, 114 S.Ct. at 1887 ("Government agencies are charged by law with doing particular tasks."). If an employee does or says something which detracts from the agency's effective operation, the government employer must have some power to restrain the employee. *Id.*, 114 S.Ct. at 1888.

The lower court suggested that these traditional restrictions on government employees' speech and action could not be applied to this case "in part because here the employee is not simply commenting on a public issue but

in speaking is actually performing his official duties." App. 38a-39a. But this reading inverts this Court's decisions – restrictions applicable only "during the performance of government business", Art. XXVIII, § 1(3)(a)(iv), should be **more** likely to be upheld than those applicable to activities which have no "relevance to their employment." *NTEU*, __ U.S. at __, 115 S.Ct. at 1012.

The lower court should be reversed in order to clarify that traditional powers of government employers to control their workplaces are enhanced, not degraded, when the restrictions impinge on the employees' official duties.

B. Yniguez' Choice of Language on the Job Was Not Protected Speech:

Even if government's rights were balanced against the rights of government employees to express personal views in official acts, Yniguez would have difficulty arguing that her choice of language on the job is protected speech. Whether or not Yniguez' choice of language in official acts is itself "content," Arizona can regulate it.

"It is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Here Yniguez has posited a "kernel" of speech.

If, for example, her choice of language has no content, it is a mere mode or conveyance of speech which does not have "a claim upon the First Amendment." *R.A.V.*, ___ U.S. at ___, 112 S. Ct. at 2545. If, on the other hand, Yniguez' choice of language has some content, the state can still control her personal speech to protect its interests.



It is difficult to determine the expressive content of the choice of a particular language. For example, the lower court believed that choice of language "signif[ies] 'solidarity' or 'comfortableness'", App. 29a, or gives "a strong message of exclusion." *Id.*, n. 20.

Accepting *arguendo* messages of "inclusion" or "exclusion"[10] as content, the government would want to control which persons receive those messages, as a matter of efficiency and effectiveness. *Waters v. Churchill*, __ U.S. at __, 114 S.Ct. at 1886 (government may stop employee from cursing or being rude to customers).

Similarly, the government's interests in efficiency and effectiveness are implicated when, as here, a supervisor cannot understand an employee's work.[11] Yniguez' supervisor could not understand her Spanish-language releases,

10 In *Hernandez v. New York*, 500 U.S. 352 (1991), this Court said that "[l]anguage permits an individual to express both a personal identity and membership in a community." 500 U.S. at 370. This might be considered a "message of inclusion." "Fighting words," on the other hand, might be considered to convey a "message of exclusion." *R.A.V.*, __ U.S. at __, 112 S.Ct. at 2544.

11 This Court vacated an earlier suggestion by Judge Reinhardt that the solution to problems associated with African-American supervisors not understanding Spanish-speaking workers was to hire bilingual supervisors. *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031, 1043 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989). Judge Kozinski and two other judges called the proposal to fire African-American supervisors a "let them eat cake" attitude which would exacerbate racial tensions in the workplace. 861 F.2d 1187, 1194 (9th Cir. 1988)(Kozinski, J., dissenting from denial of rehearing *en banc*). Judge Reinhardt considers the vacated opinion to still "represent the thinking" of the Ninth Circuit. *Garcia v. Spun Steak Co.*, 13 F.3d 296, 301 (9th Cir. 1994)(Reinhardt, J., dissenting from denial of rehearing *en banc*).

granting claims of up to $10,000, yet the lower court saw no degradation in efficiency from the supervisory lapse. App. 45a.

Furthermore, if, as Yniguez suggests, "any particular language does not express the same ideas and feelings in the same manner or with the same effect as a different language," J.A. 45, 51-52, the government's interest in accuracy entitles it to choose which language will "ensure that its message is **neither garbled nor distorted**". *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2519 (emphasis added).

In addition, controlling "messages of inclusion or exclusion" implicates the government's valid state interest in its own legitimacy – "sustain[ing] the active alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States v. Int'l Union United Automobile Workers*, 352 U.S. 567, 575 (1957). One observer, for example, suggests that the modern proliferation of official language declarations like Arizona's was sparked when Miami resident Emmy Schaefer could not find a Dade County employee who would speak English to her. Linda Chavez, *Out of the Barrio*, 1991, 93.

Finally, government has substantial interests in protecting itself and society from the divisive effects of official multilingualism. A common language promotes the maintenance of our pluralistic democracy:

> [I]f language and cultural separatism rise above a certain level, the unity and political stability of the nation will – in time – be seriously diminished. Pluralism within a united American nation has been the single greatest strength of this country. This unity comes from a common language and a core public culture of certain shared values, beliefs,



> and customs which make us distinctly "Americans."

S. Rep. No. 132, 99th Cong., 1st Sess. 7 (1985); S. Rep. No. 62, 98th Cong. 1st Sess. 7 (1983) (same); *Guadalupe*, 587 F.2d at 1027 (syncretism alone cannot prevent instability from linguistic fragmentation and isolation).

The leaders of the Arizona Legislature, urging voters to adopt Art. XXVIII, echoed this concern:

> Ours is an age when governments and educators in almost every country in the world encourage children to learn English, a language recognized as the language of international business and air travel as well as that of unity and prosperity.
>
> The motto of our nation, "*E Pluribus Unum*", "Out of Many, One", is the enduring theme and strength of America. Today, due to a **trend toward official multilingualism**, our great unifying force – the use of the English language – is eroding, and our nation is becoming a people separated by, instead of unified by, language.

J.A. 29-30 (emphasis added).

"While the Constitution protects against invasions of individual rights, it is not a suicide pact." *Haig v. Agee*, 453 U.S. 280, 309 (1981), *quoting, Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). "National unity as an end which officials may foster by persuasion and example is not in question." *Texas v. Johnson*, 491 U.S. 397, 418 (1989), *quoting West Virginia Board of Education v. Barnette*, 319 U.S. 624, 640 (1943). At the least, Art. XXVIII is an attempt to foster unity by example.

Against these strong interests in efficiency, effectiveness, accuracy, legitimacy and encouragement of unity, Yniguez posits a desire to express personal feelings of plu-

ralism and solidarity **during the performance of government business**. Her choice of language cannot outweigh these strong state interests.

Either Art. XXVIII does not implicate a public employee's speech at all, affects only a mode or conveyance of speech, or protects important state interests. In no case is Art. XXVIII subject to facial overbreadth invalidation.

### C. Art. XXVIII Is Content-Neutral and Leaves Open Alternative Opportunities for Speech.

If Article XXVIII is not directed at the **content** or **ideas** intended to be expressed by a government employee's choice of language, it can ban even expressive conduct. "Government regulation of expressive activity is content-neutral so long as it is justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)(citation omitted). Neutral regulations may even have an "incidental effect on some speakers or messages but not others," so long as they are neutral as to the content of the expression. *Id.*

Article XXVIII is the quintessential narrow, neutral regulation. The regulation applies only to official actions "during the performance of government business." Content does not trigger the regulation, whether the message is "inclusion" or "exclusion." App. 29a n. 20.

Article XXVIII also leaves open every alternative avenue of communication **except** official actions of government. Speeches outside of the government workplace, writing letters to the editor, organizing rallies, lobbying – indeed, the entire gamut of First Amendment-protected activities is available to government employees – **except** they must use English for official government action.



Yniguez testified that she could denounce Article XXVIII, the governor, the government, or any other topic she chose, in any language she chose, so long as she was not on the job. Reporter's Transcript, April 27, 1989, pages 6-8. Presumably, she could communicate "inexpressible" concepts of medical malpractice to attorneys, speak Spanish to Spanish-speaking claimants (sending personal messages of pluralism and solidarity), even draft translations of settlement documents in Spanish – so long as the actual official acts involved were in English.

Article XXVIII is a content-neutral regulation of conduct which leaves open every opportunity for personal speech on personal time. As such, Art. XXVIII should withstand constitutional scrutiny even if choice of a particular language for government action is considered expression.

### D. Art. XXVIII is Constitutional Even Under Judge Reinhardt's New "Encouragement" Theory.

In place of the state's interests in efficiency, effectiveness, accuracy, legitimacy and unity, Judge Reinhardt posits a new "constitutionally-permissible means for promotion of our growth as a unified nation", App. 54a – we may not "compel immigrants to give up their native language; instead, we [must] encourage[] them to learn English."[12] App. 59a.

12 Immigrants overwhelmingly support English as the official language. Frank Viviano, "Poll Contradicts Stereotypes," *San Francisco Chronicle*, March 28, 1990, A1 ("Among the poll's surprising findings are that Asian[] and Hispanic[ immigrants] overwhelmingly favor making English the official language of California."); "Failed policies such as bilingual education and

Under this standard, Art. XXVIII should have been upheld, since it "compels" only government. Compelling government to "preserve, protect and enhance the role of English," encourages all persons to preserve unity, a permissible activity under the First Amendment. *Texas v. Johnson*, 491 U.S. at 418.

Yniguez' claim is at heart a political, not a constitutional one; her views on solidarity and pluralism do not outweigh Arizona's legitimate interests. Government employees have no First Amendment right which outweighs Arizona's right to use English. Whether viewed as speaker or employer, Arizona has the right to use English. Under the First and Tenth Amendments, this Court should reverse the decision below.

## IV. PETITIONERS HAVE STANDING TO MAINTAIN THIS ACTION.

Arizona would have standing to defend Art. XXVIII. *Maine v. Taylor*, 477 U.S. 131, 136 (1986)("a State clearly has a legitimate interest in the continued enforceability of its own statutes"). Unfortunately, Arizona is not actively defending Art. XXVIII, either by choice or under the Ninth Circuit's decision limiting its participation as a party. J.A. 182-83. The question is, then, whether AOE, the proponent of the initiative, may defend Art. XXVIII in the absence of a full State participant.

multicultural curricula are not being demanded by Mexican laborers or Chinese waiters. Instead they are being rammed down immigrants' throats by federal, state and local governments, at the behest of native-born political activists and bureaucrats." Linda Chavez and John J. Miller, "The Immigration Myth," *Reader's Digest*, May 1996, 73.



### A. Petitioners Have "Defensive" Standing to Defend Art. XXVIII Both as Proponents and Under a Grant of Rights.

#### *1. As the Legally-Recognized Proponent, AOE Has Standing to Defend Its Initiative As Representative Of the Enactors.*

An enacting body may defend its statutes. For example, in *INS v. Chadha*, 462 U.S. 919 (1983), this Court noted that, where the Executive Branch agreed with a challenger that a "one-house veto" statute was unconstitutional, Congress' defense of the statute on appeal provided the "concrete adverseness" required by Article III. 462 U.S. at 939. "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." 462 U.S. at 940.

The same is true at the state level. *Coleman v. Miller*, 307 U.S. 433, 438 (1939)(state legislators whose votes "have been overridden and virtually held for naught" by an Executive decision have a sufficient stake in the outcome under Article III to vindicate their interests in federal court); *Karcher v. May*, 484 U.S. 72, 81 (1987)(legislature has the authority to defend the constitutionality of a statute attacked in federal court). In Article III terms, this case is indistinguishable from *Chadha* and *Coleman*.

In Arizona, the people are the enactors of legislation:

> (1) The legislative authority of the State shall be vested in a Legislature,...but the people reserve the power to propose laws and amendments to the Constitution and to **enact or reject** such laws and

amendments at the polls, **independently of the Legislature**...

* * * * * *

(6) The veto power of the Governor, or the power of the Legislature, to repeal or amend, shall not extend to initiative or referendum measures approved by a majority vote of the qualified electors.

ARIZ. CONST., Art. IV (emphasis added).

There is no reason why the people of Arizona, whose enactments cannot be vetoed or repealed by their elected representatives,[13] deserve less representation in court than the Legislature or members of unions. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.* ("*UFCW*"), __ U.S. __, No. 95-340, decided May 13, 1996, slip op. 11-12. Thus, the question is whether AOE is an appropriate enactors' representative in court.

The lower court thought so: "While the people may not always be able to count on their elected representatives to support fully and fairly a provision enacted by ballot initiative, they can invariably depend on its sponsors to do so." J.A. 168. AOE spent hundreds of thousands of dollars and thousands of hours of time drafting, qualifying and promoting the passage of its initiative. J.A. 124. Under *UFCW*, AOE is "in a position to serve as the [plaintiffs'] natural adversary." Slip Op. 11-12.

13 Of course, the people cannot do by initiative what their government could not do. *Reitman v. Mulkey,* 387 U.S. 369 (1967)(striking initiative which violated constitutional guarantees). But, as shown above, the Arizona Legislature could adopt an official language; thus, the people can also.



As a legally-recognized proponent, AOE has specific duties and rights prescribed by law, with a risk of prosecution for violations. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 19-111 (1996) (intending proponent must file application with Secretary of State), 19-114 (prohibiting circulation of petitions by certain persons), 19-115 (prohibiting certain other acts), 19-122 (Secretary of State must provide written statement to proponents of reasons for rejecting proposed initiative), 19-124 (proponent may work with Secretary of State to craft legislative explanation for voters).

These separate rights, duties and enforcement risks sufficiently differentiate, for Article III purposes, AOE from other voters. *Warth v. Seldin,* 422 U.S. 490, 501 (1975). AOE is a legally-recognized participant in the process by which Art. XXVIII was enacted, not just a "private citizen," with a "philosophical interest in the outcome of litigation", J.A. 165, who will use the litigation as a "vehicle for the vindication of value interests". *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

This Court has recognized initiative proponents as representatives to defend the statutes they proposed. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, __ U.S. __, 115 S.Ct. 1842 (1995); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); *Crawford v. Board of Education of City of Los Angeles*, 458 U.S. 527 (1982). Under *UFCW*, initiative proponents should be recognized as common law or statutory representatives for representational standing purposes. Slip op. 13.

As proponent, AOE is an active and appropriate representative of the enacting body, and thus has standing to defend the enactors' interests against charges that its initiative is unconstitutional.

*2. AOE Also Has Standing To Defend Its Initiative Under A Grant of Rights.*

AOE and Park also have standing to defend their initiative because Art. XXVIII reserves enforcement power to persons doing business or residing in Arizona. ARIZ. CONST, Art. XXVIII, § 4. In a footnote in *Diamond v. Charles*, this Court recognized that the invasion of statutorily-created rights could sustain standing to defend the constitutionality of a challenged statute. *Diamond*, 476 U.S. at 65, n. 17.

Justice O'Connor's concurrence in *Diamond* suggests that one test is whether AOE could show an "actual, present interest that would permit [it] to sue or be sued by appellees or the State . . . , or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation." *Diamond*, 476 U.S. at 77 (O'Connor, concurring). Under Art. XXVIII, § 4, AOE is entitled to sue the State or any other government employee, including those represented by both Yniguez and ACT.

AOE might, for example, sue the State for limiting Art. XXVIII under the erroneous portion of Attorney General Opinion I89-009. J.A. 61. The Attorney General's opinion, though correct in recognizing that Art. XXVIII applies only to official acts, is premised on an erroneous understanding of federal law: "[l]inguistic groups are ethnic groups." J.A. 66. No federal court has ever so held. *See, e.g., Soberal-Perez*, 717 F.2d at 41 ("Language, by itself, does not identify members of a suspect class.").

Based on this erroneous assumption, however, the Attorney General opines that federal law requires Arizona to use languages other than English whenever "use of a language other than English is reasonably needed to provide governmental services fairly and effectively without adversely impacting an ethnic/linguistic group." J.A. 63-64, 71. This statement ignores the unbroken holdings of federal and state courts which have rejected just such claims. *See, e.g.*, P. 16, 18-19, *supra*. Just as AOE wishes to defend the State's rights against Yniguez and ACT, AOE wishes to defend against the Attorney General's erroneous abdication.[14] If Art. XXVIII is voided as unconstitutional, however, AOE will not have the opportunity to defend the State's rights.



This Court permits intervention – even after a judgment or settlement – in order to protect rights and promote judicial efficiency. *United Airlines v. McDonald*, 432 U.S. 385 (1977)(permitting intervention after settlement); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 765 (1989)("piecemeal litigation of complex civil rights controversies [is] a result that is strongly disfavored"). Here, AOE is defending Art. XXVIII against the State, Yniguez, and ACT, in part on the same legal principles. Handling all three claims in the same proceeding would promote judicial efficiency. *Zipes*, 491 U.S. at 765.

If AOE does not have standing in this case, then no initiative is safe from collusive suits. All a State would need to do to avoid initiatives it did not like was to refuse to appeal an adverse ruling. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983)(public interest group entitled to intervene as a matter of right in suit,

14 The Attorney General earlier attempted to waive the State's Eleventh Amendment defense to nominal damages. Motion to Modify Opinion, 2. AOE opposed the attempt, noting that under Arizona law, the Attorney General has no such power. Intervenor-Appellant's Opposition to State of Arizona's Motion to Modify Opinion, 2, *citing Ford Motor Co. v. Dept. of Treasury of the State of Indiana*, 323 U.S. 459, 467-70 (1945).

which it called "Watt v. Watt," challenging legality of administrative measure which it had supported), *citing, Washington State Building & Const. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

If AOE is ever to enforce its rights in federal court, it is in this case, which has been prosecuted against great odds for eight years. AOE, which actively represents the interests of hundreds of thousands of Arizonans who voted for Art. XXVIII, has standing to maintain this action.

### B. Petitioners Also Meet Traditional Standing Criteria.

AOE also meets the traditional criteria for demonstrating "offensive" standing: injury, causation, and redressability. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

AOE has suffered and continues to suffer injury arising directly from the lower court decisions in this case. AOE spent hundreds of thousands of dollars and thousands of hours of volunteer time promoting its initiative - exercises of fundamental First Amendment rights. *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988)(initiative activity is core political speech). The nullification of AOE's efforts creates injury. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1168-69 (D.C.Cir. 1982), *cert. denied*, 464 U.S. 82 (1983)(legislator alleging vote nullification had standing); *Moore v. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984), *cert. denied*, 496 U.S. 1106 (1985).

In addition, AOE's rights to sue created by Art. XXVIII, § 4 have been vitiated. It would be impossible for AOE to file suit under a provision which has been declared facially overbroad and unconstitutional by a federal



court. J.A. 173-76; *H.L. v. Matheson*, 450 U.S. 398, 406 (1981)(unappealed federal court ruling is binding on a State). Indeed, anyone AOE tried to sue to enforce its initiative could claim that Article XXVIII was unconstitutional if applied to them. Thus, AOE has been injured directly by the lower court decisions in this case.

All of AOE's injuries will be redressed if the opinions below are reversed. AOE will enjoy the fruits of its efforts and the peace of not having to face obligations and risk in the initiative process once again.

Nor should "prudential" concerns block standing. Given the enforcement powers of Article XXVIII, § 4, the initiative proponents are within the "zone of interests" protected by the statute. *Diamond*, 476 U.S. at 65, n. 17; *Warth v. Seldin*, 422 U.S. 490, 500-501 (1975).

This Court should find that AOE has standing to maintain this action, either to defend the statute, promote its own rights, or avoid piecemeal civil rights litigation.

## V. WHETHER OR NOT YNIGUEZ MAINTAINS A CASE OR CONTROVERSY, THIS CASE IS STILL VIABLE.

Respondent Yniguez left government employment in April 1990. Under ordinary circumstances, her claim would be moot and all lower decisions should be vacated.

Yet a case is moot only when "**the parties** lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)(emphasis added). There are four parties in this case, each of whom has at least one live controversy against the others. This case is not waiting for subsequent events to "rekindle" the controversies between the parties, *Deakins v. Monaghan*,

484 U.S. 193, 201 (1988) – at least three of those controversies are ripe today:

**ACT's opposition to Art. XXVIII**. ACT, a political committee "consisting of multilingual state elected officials, state employees and citizens of Arizona," ACT Opp. to Petition for Certiorari, 2, intervened with full rights and obligations of a plaintiff in this case. *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1993)(intervenor is a full participant in case, treated as if it was an original party); *Alexander v. Hoffman*, 296 U.S. 222 (1935)(intervenor is subject to a complete adjudication of all issues between parties). ACT is actively litigating the constitutionality of Art. XXVIII against both AOE and the State.

The presence of a party plaintiff, despite the disappearance of the original plaintiff, ensures that this case is not moot. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 431 (1976). Because of the strong public policy against piecemeal litigation of complex civil rights questions, *Zipes*, 491 U.S. at 765, ACT should be allowed to maintain its action in this Court.

**AOE's own state and federal rights**. As shown above, AOE maintains strong interests in settling its own state and federal rights against the State, ACT, and Yniguez. In addition, AOE ought to be able to defend its statute against ACT's constitutional attack. And, to the extent Yniguez retains any representational interest in this case, AOE ought to be able to defend its statute against the claims of the third parties she represents.

**The State's defense against the award of nominal damages**. On November 7, 1995, the District Court awarded $1 in nominal damages to Yniguez. J.A. 211. Arizona should be able to contest the award on appeal. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478



n.1 (1989)(claim for damages kept constitutional challenge from being moot). And AOE is actively contesting the Arizona Attorney General's waiver of Eleventh Amendment immunity against nominal damages. *See*, n. 11 *supra*.

In addition, Yniguez may still possess a live interest. Ordinarily, if Yniguez failed to obtain a class certification, her representational capacity vanishes with her own claim. *Pasadena*, 427 U.S. at 430. Yet the District Court did not rely on Yniguez' rights: "All the court need find, and all it does find in this regard, is that Article XXVIII is so broad as to inhibit the constitutionally protected speech of third parties." App. 106a. Yniguez's representational role may survive the expiration of her own claim. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 402 (1975)("The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff even though the claim of the named plaintiff has become moot.").

At least three and possibly four of these live controversies are ripe for this Court's review.

## CONCLUSION

For the reasons stated, the Court should reverse the decision below, find that Article XXVIII does not violate the First Amendment, and award fees and costs and such other relief as the Court considers appropriate.

Respectfully Submitted,

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In The

# Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,

*Petitioners,*

v.

STATE OF ARIZONA; MARIA-KELLY F. YNIGUEZ; JAIME GUTIERREZ; and ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## QUESTIONS PRESENTED

This brief addresses the questions posed by the Court:

1. Is there a case or controversy with respect to Respondent Yniguez?

2. Do Petitioners have standing to maintain this action?

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## INTRODUCTION

This brief does not address the Petitioners' questions presented, because – despite their tortured efforts to do so – lower federal courts never should have reached the merits of this case. Instead, this brief addresses only this Court's questions regarding the appropriateness of the lower courts' exercise of jurisdiction under Article III.

Although the question of what, if any, First Amendment protection is available to a public employee who wishes to speak in a language other than English as part of her employment is certainly an important legal issue, this litigation is not the proper vehicle for this Court to resolve that issue. Indeed, no court has had Article III jurisdiction over this dispute for quite some time. The proceedings below are a testament to a single-minded determination to resolve the merits of this dispute regardless of jurisdictional defects. It would be difficult to find a decision that does more violence than do the ones in this case to the oft-cited principle that federal courts should "refrain from passing upon the constitutionality [of a state law] unless obliged to do so in the proper performance of [their] judicial function." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

The Court quite correctly identified Petitioners and Respondent Yniguez as questionable parties to litigate this dispute. Once the jurisdictional quandary posed by this convoluted litigation is sorted out, it is clear that there is no case or controversy and that the proper

disposition is for the Court to vacate the judgment and order the Complaint dismissed.

## STATEMENT OF THE CASE

### A. Article XXVIII.

In October 1987, Petitioners, Arizonans for Official English (AOE), an unincorporated association, and its spokesman, Robert D. Park, launched an initiative drive to amend the Arizona Constitution to designate English as the State's official language and to limit state and local government employees' work-time use of any language other than English. (Pet. App. 4a.) In November 1988, Arizona voters narrowly approved the initiative, which became Article XXVIII of the Arizona Constitution. *Id.*[1]

On January 24, 1989, the Arizona Attorney General issued a formal, published opinion in which he concluded that Article XXVIII would not affect the delivery of state services in a language other than English:

> We do not interpret [Article XXVIII] as necessitating elimination of assistance provided by government in languages other than English where such assistance is reasonably needed to ensure fair and effective delivery of governmental services to non-English speakers. . . . [W]e reiterate that the provision of section 3(1)(a) [of Article XXVIII], "This state and all political subdivisions of this state shall act in English and in no other language," means that official acts of government as government shall be in English as the state's official language.

[1] The text of Article XXVIII appears at Pet. App. 60a-62a.



(J.A. 61, 71-72.) Thus, the Attorney General concluded that the provision did not prohibit all uses of non-English by state and local government. Neither the Arizona Governor nor any other state official in this litigation has taken a position with respect to the proper construction of Article XXVIII contrary to that set forth by the Attorney General.

### B. The Instant Lawsuit.

#### 1. The District Court.

Two days after passage of Article XXVIII, Respondent Maria-Kelly F. Yniguez, an employee in the Risk Management Division of the Arizona Department of Administration, sued the State of Arizona pursuant to 42 U.S.C. § 1983, in the United States District Court for the District of Arizona, seeking to enjoin enforcement of Article XXVIII and to have it declared unconstitutional under the First and Fourteenth Amendments of the United States Constitution and unlawful under 42 U.S.C. § 2000(d). (R. 1.) She filed suit even though after the passage of Article XXVIII, no one – not Yniguez's immediate supervisor, any other supervisor, or any defendant – told her to stop speaking Spanish when performing her duties. (R. 62 at 12.)

The State responded by asserting its Eleventh Amendment immunity from suit in federal court. (R. 6.) In an amended complaint, Yniguez added the Governor

of the State of Arizona, the Attorney General of the State of Arizona, and the Director of the Arizona Department of Administration. (R. 5.) A second amended complaint added then-state Senator Jaime P. Gutierrez as a plaintiff, and dropped the State as a defendant. (J.A. 55.)

In 1988, the State Defendants moved to dismiss Yniguez's claim (R. 6, 26) and in 1989, to dismiss Gutierrez's claim (R. 68) based on Eleventh Amendment immunity and the absence of a live case or controversy. (R. 30.) On February 6, 1990, the district court concluded on the merits that Article XXVIII reached a substantial amount of conduct protected by the First Amendment and that therefore Article XXVIII was overbroad and unconstitutional on its face. (Pet. App. 108a.)

In the same opinion, the district court finally acted on the State's motions to dismiss. (Pet. App. 97a.) The district court held that Gutierrez's claims against the State Defendants and Yniguez's claim against the Attorney General were barred by the Eleventh Amendment. *Id.* at 99a-101a. The court also determined that Yniguez could seek declaratory and injunctive relief against Mofford and Eden because both officials had the *authority* to enforce Article XXVIII. *Id.* at 100a. The court found no actual controversy between Yniguez and Eden, however, because Eden had not threatened to enforce Article XXVIII. *Id.* at 104a. By contrast, the Court found that Governor Mofford's statement that she intended to obey Arizona's Constitution and expected state service employees to comply with Article XXVIII sufficiently



threatened enforcement[2] to satisfy the case or controversy requirement. *Id.* at 102a-103a.[3]

Governor Mofford, an outspoken opponent of Article XXVIII, announced that she would not appeal the district court decision because she agreed with it. (Pet. App. 8a.) The Arizona Attorney General, on behalf of the State of Arizona, moved to intervene in the district court pursuant to 28 U.S.C. § 2403(b) for purposes of appealing the decision declaring a provision of the Arizona Constitution unconstitutional. (R. 93.) Petitioners also moved to intervene to appeal the district court decision. (J.A. 94.) The court denied the Attorney General's motion because Governor Mofford was a party (J.A. 141), and denied Petitioners' motion, concluding that they lacked standing under Article III of the Constitution. *Id.* at 144-48.

On April 20, 1990, Yniguez voluntarily quit her job with the State for reasons unrelated to this litigation. (J.A. at 187.)

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[2] It is ironic that the district court granted relief against Governor Mofford, because she had opposed Article XXVIII in the 1988 General Election Voter Publicity Pamphlet (J.A. 22, 38-39), and publicly instructed state employees to conduct business in whatever language is needed "to serve the public." (R. 15, Exh. 4.)

[3] The district court refused to abstain from construing Article XXVIII (*id.* at 111a), denied the State's request to certify the question of Article XXVIII's construction to the Arizona Supreme Court (J.A. 138-39), and rejected the Attorney General's narrowing construction of Article XXVIII. (Pet. App. 108a-110a.)

### 2. The Court of Appeals.

#### a. The intervention decision (*Yniguez I*).

Governor Mofford did not appeal the district court's decision. (Pet. App. 8a.) The Attorney General, on behalf of the State of Arizona, and the Petitioners, however, appealed the district court's denial of their motions to intervene and also sought to appeal the district court's decision on the merits. (J.A. 150, 162.)

In July, 1991, the court of appeals held that Petitioner AOE had standing to intervene to appeal the district court's judgment, absent an appeal by any party to the judgment, because AOE, as sponsor of the ballot initiative, had a particularized injury "distinguishable from" that of concerned bystanders. *Yniguez v. State of Arizona*, 939 F.2d 727, 732 (9th Cir. 1991) (*Yniguez I*) (J.A. 167-68). The court further held that Petitioner Park had standing because he had indicated his intention to enforce Article XXVIII through the private right of action contained in section four of the article. *Id.* at 169-70.[4] The court of appeals held that the Attorney General was judicially estopped from changing his earlier decision to seek dismissal of the three State Defendants, and therefore was precluded from appealing the district court's decision. *Id.* at 180. The court concluded, however, that 28 U.S.C. § 2403(b) gave the State the right to "make an argument

[4] By this time, Yniguez had been gone from state employment for approximately fifteen months. Because there was no other plaintiff-appellee, it is not clear against whom AOE and Park were appealing or against whom Park would enforce the act.



on the question of the constitutionality [of Article XXVIII], but [the Attorney General] is given no right to appeal as a party" (*id.* at 182), emphasizing that the Attorney General's right to argue was contingent upon Petitioners bringing the appeal. *Id.* at 183. Although the court specifically stated that it would retain jurisdiction over the appeal of the district court's decision on the merits (*id.* at 183-84), the court issued its mandate from the intervention decision on August 20, 1991. (J.A. 4.)[5]

#### b. The mootness decision (*Yniguez II*).

In the summer of 1991, the State became aware that Yniguez was no longer a state employee and in September 1991, the State filed a suggestion of mootness, informing the court that Yniguez had not been employed by the State since April 20, 1990. (J.A. 187.) Even though Yniguez had quit her job and never sought certification of a plaintiff class, Petitioners and Yniguez argued that the case was not moot because she had standing to challenge

[5] When Petitioners and the Attorney General appealed the district court decision, neither was technically a party. Both had been denied leave to intervene. Accordingly, the Ninth Circuit apparently anticipated that a new notice of appeal would be filed by Petitioners in the district court. *See Pellegrino v. Nesbit*, 203 F.2d 463, 468 (9th Cir. 1953) (declining to consider appellant's case on the merits because the appellant, whose motion to intervene had been denied below, was not in "a position to perfect an appeal until the question of his right to intervene for that purpose had been decided in his favor"). Thus, the court issued a mandate after resolving only the intervention issue.

the overbreadth of Article XXVIII on behalf of third parties. (J.A. 188, 194.) Further, although Yniguez never requested damages from the district court and she never appealed the district court's failure to award damages, Yniguez also argued that her ability to claim nominal damages would save the case from being moot. (J.A. 197.) In September 1992, the court of appeals issued a formal opinion rejecting the State's suggestion of mootness. *Yniguez v. State of Arizona*, 975 F.2d 646 (9th Cir. 1992) (*Yniguez II*) (Pet. App. 93a). The court of appeals adopted Yniguez's argument concerning nominal damages, holding that even though Yniguez had never requested nominal damages in the district court and the district court did not award her any damages, the "possibility that Yniguez may seek nominal damages on appeal is sufficient to prevent mootness." *Id.* at 95a.

The court acknowledged that Yniguez's nominal damage claim was contrived on appeal solely to avoid mootness:

> Although Yniguez did not previously appeal the district court's implicit denial of a request for nominal damages [which Yniguez never requested], she had no reason to seek this form of relief at the time of the district court's judgment. Only now does the State press its mootness argument. Yniguez therefore may raise the issue of nominal damages in a future cross-appeal.

*Id.* at n.2.

The court also suggested other methods by which Yniguez could cure mootness, such as adding a new plaintiff whose claims were not moot or proving that other individuals affected by Article XXVIII did not



pursue claims in reliance on Yniguez's continued pursuit of her case. *Id.* at 96a. The court concluded by remanding the case for further proceedings in conformity with the court of appeals' disposition. *Id.*

No mandate issued from this mootness decision, but the case was returned to the district court in light of the intervention decision (see note 4, *supra*), and Petitioners AOE and Park filed a cautionary notice of appeal, recommending dismissal because Yniguez had neither cured the mootness by requesting nominal damages nor followed the court of appeals' other suggestions for curing the mootness. (J.A. 206.) Without filing any pleading in the district court requesting nominal damages or otherwise addressing the mootness issue, Yniguez filed a notice of cross-appeal. (J.A. 209.)

In 1994, after oral argument on the merits before the court of appeals, Arizonans Against Constitutional Tampering (AACT) and its chairman Thomas Espinosa moved to intervene in the pending appeal. (Pet. App. 10a.) AACT is a self-described political action committee composed of Arizona citizens who opposed Article XXVIII.[6] *Id.* To support their intervention, AACT and Mr. Espinosa merely asserted that they were political counterparts to AOE. *Id.* at 11a. The court of appeals granted their motion to intervene in June, 1994. (J.A. 14.)

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[6] The record does not show that AACT has ever registered with the Arizona Secretary of State as a political action committee, a citizens initiative campaign committee, or in any other capacity.

### c. The panel decision on the merits (*Yniguez III*).

On December 7, 1994, a panel of the court of appeals affirmed the district court's 1990 decision, declaring Article XXVIII facially overbroad in violation of the First Amendment. *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1994) (*Yniguez III*). The court rejected the narrow construction offered by the Attorney General, finding the construction at odds with the language of Article XXVIII. *Id.* at 1225-27. The court also refused to abstain from deciding the question of the amendment's construction or to certify the question to the Arizona Supreme Court. *Id.* at 1227-28. The court of appeals held Article XXVIII unconstitutional, but reversed and remanded the district court's judgment insofar as it denied Yniguez an award of nominal damages. *Id.* at 1243.

### d. The en banc decision (*Yniguez IV*).

On Petitioners' suggestion for rehearing en banc, a majority of the Ninth Circuit voted to rehear the matter en banc. On October 5, 1995, a six-five majority of the en banc panel concurred in an opinion essentially identical to the opinion issued by the three-judge panel. *Yniguez v. Arizonans for Official English*, 69 F.3d 20 (9th Cir. 1995)



(*Yniguez IV*) (Pet. App. 11a).[7] The five dissenting judges would have upheld the constitutionality of the provision.

## SUMMARY OF ARGUMENT

### I.

The First Amendment issue posed here was too inviting for the courts below to avoid deciding merely because there was no case or controversy. This Court should not follow that same course, but should dismiss the case as moot and vacate the underlying judgment.

Respondent Yniguez was never threatened with enforcement of Article XXVIII and therefore did not suffer actual injury. Moreover, Yniguez long ago mooted this litigation by voluntarily leaving the employ of the State of Arizona. She filed her Complaint individually and sought only declaratory and injunctive relief. Once Yniguez resigned, she no longer had a continuing interest in being able to speak Spanish while performing work for the

[7] In 1992, certain Arizona elected officials and employees filed a declaratory judgment action against the State of Arizona, the Arizona Governor, and the Arizona Attorney General in Arizona Superior Court challenging the constitutionality of Article XXVIII. *Ruiz v. State*, No. CIV92-19603. The Arizona Superior Court upheld the constitutionality of the provision. On June 11, 1996, the court of appeals reversed, without analyzing the merits, deferring for reasons of comity to the decision of the Ninth Circuit in this case. *Ruiz v. Arizonans for Official English*, No. 1 CA-CV 94-0235 (June 11, 1996).

State. Thus, she could no longer legitimately seek declaratory or injunctive relief. The absence of a request for class certification doomed any claim for on-going relief.

The court of appeals' contrived effort to sustain this dispute based on a possible claim for nominal damages is inconsistent with the record in the case and incorrect as a matter of law. First, Yniguez never requested nominal damages. Nor on this record could she have received any because, as the district court found, "there is no evidence of record to establish that Yniguez's asserted injury is anything except purely conjectural and hypothetical to the extent that it stems from any private actions of the Defendants." Pet. App. 103a.

Second, there is no basis for Yniguez to receive any nominal damages as a matter of law. She has no possible claim against Petitioners because they are not state actors and did not act in concert with state actors. Her claim against Arizona fares no better because she voluntarily dismissed the State as a party. Additionally, neither Arizona nor the Governor in her official capacity is amenable to suit under 42 U.S.C. § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 70-71 (1989). Finally, even if Yniguez had a colorable claim for damages, that claim is purely incidental to the request for declaratory relief and cannot alone sustain the weight of this litigation. *See Alejandrino v. Quezon*, 271 U.S. 528, 533-34 (1926). Thus, there never has been a basis for any monetary recovery in this litigation and accordingly there is no live or actual controversy underlying this litigation.



Under familiar principles announced by this Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the proper disposition of the case is now to vacate the judgments below and to dismiss the Complaint so that this litigation carries with it no collateral effects.

## II.

It is equally clear that Petitioners have no standing to defend the constitutionality of Article XXVIII. This Court already has decided this issue summarily in *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company of Chicago*, 460 U.S. 1077 (1983). In that case, the Court dismissed for lack of standing an appeal by the proponents of a state initiative that had been declared unconstitutional as a violation of the Contract Clause.

Like the initiative proponents in *Don't Bankrupt Washington*, Petitioner AOE is a citizens group that drafted and campaigned for Article XXVIII. Petitioner Park is AOE's chairman. Neither was a defendant in the suits brought by Yniguez. They intervened to appeal the district court decision. Because the State Defendants did not appeal or were not permitted to appeal, Petitioners must demonstrate that they have an appealable interest – that is, that they independently satisfy the traditional standing requirements. In this case, Petitioners cannot satisfy those requirements because their injury is one that is shared by all or a large class of citizens.

The proper representatives of the citizens are the State itself and its elected officials. If factions within the public are unhappy, "our system provides for changing

members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them." *United States v. Richardson*, 418 U.S. 166, 179 (1974). Because Petitioners were not elected to represent the citizens of Arizona, they lacked standing to pursue this appeal.

## III.

Because neither Respondent Yniguez nor Petitioners are proper parties to this litigation, the question arises whether the Court nevertheless can do more than simply dismiss the Petition. The Court is not powerless to act because, even when the Court lacks jurisdiction, it "may make such disposition of the whole case as justice may require." *Walling v. Reuter Co.*, 321 U.S. 671, 677 (1944). In this case, "justice" requires the entire case to be dismissed.

This case is moot and the general rule is that mootness justifies vacatur of the underlying proceedings. *Munsingwear*, 340 U.S. at 40. Respondent Yniguez should not be permitted to benefit from mooting the case after judgment was entered in her favor. Moreover, the decision of the court of appeals departs so profoundly from the mandate of Article III that its judgment should not be left undisturbed to the detriment of the legitimate interests of Petitioners and the voters of the State of Arizona.



## ARGUMENT

### I. There Is No Case or Controversy With Respect to Respondent Yniguez.

#### A. No Case or Controversy Exists Between the Governor and Respondent Yniguez Because She Was Never Threatened with Enforcement of Article XXVIII.

The threshold question in this case is whether a live case or controversy ever existed between Yniguez and the State Defendants, since they never threatened to enforce Article XXVIII against her. A hypothetical threat of injury is not sufficient to invoke this Court's jurisdiction. *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947). "Plaintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Article III requirement of an actual controversy allows federal courts jurisdiction to hear only cases where the threat of injury is "both 'real and immediate,' [and] not 'conjectural' or 'hypothetical.'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (quoting *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969)). *See also Lewis v. Casey*, No. 94-1511, Slip Op. at 5 (June 24, 1996) (prisoner must show actual injury; "the status of merely being subject to a governmental institution that was not organized or managed properly" is insufficient to invoke the intervention of the courts). Moreover, mere allegations that a law chills First Amendment rights is insufficient to overcome the actual injury requirement. *See Boyle*

*v. Landry*, 401 U.S. 77, 81 (1971) (plaintiff's First Amendment challenge to state law dismissed where plaintiffs failed to demonstrate that they were in jeopardy of suffering irreparable injury). Because there was no real or immediate threat of injury to Yniguez, no case or controversy ever existed.

The district court found that Yniguez met the Article III requirement of actual injury to the extent that she asserted an injury resulting from Governor Mofford's official actions. (Pet. App. 102a.) This finding is based on pure speculation. More likely, Governor Mofford, who adamantly opposed Article XXVIII, would have relied on the Attorney General's formal opinion, which stated that Article XXVIII did not apply to the day-to-day delivery of government services such as those provided by Yniguez. (*See* J.A. 61.) Therefore, there was no actual case or controversy between Governor Mofford and Yniguez. *See Poe v. Ullman*, 367 U.S. 497 (1961) (holding that petitioner's case seeking declaratory relief presented no justiciable controversy where the prosecutor expressly agreed not to prosecute and the state had not enforced the statute at issue for eighty years); *see also supra* note 2 (after enactment of Article XXVIII, the Governor instructed state employees to conduct business in whatever language is needed to serve the public) and argument in *amicus curiae* brief filed by U.S. English, Inc. at 8-12.



### B. No Case or Controversy Has Existed Since Yniguez Voluntarily Quit Her Job While the Case Was Pending on Direct Review.

Only state officers and employees were subject to Article XXVIII. Therefore, even if there were a sufficient threat of immediate enforcement when Yniguez filed suit, that threat clearly disappeared when she quit her state employment. The Article III requirement of a live and actual controversy deprives federal courts of jurisdiction to hear moot cases. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

Once Yniguez voluntarily resigned from state employment while the case was pending on direct review, she no longer could have been threatened with enforcement of Article XXVIII. Therefore she no longer had a legally cognizable interest, if she ever had one, in obtaining a judgment declaring Article XXVIII unconstitutional. Yniguez's declaratory relief claim became moot once she voluntarily left state employment. *Golden v. Zwickler*, 394 U.S. 103 (1969) (finding plaintiffs' complaint for declaratory relief moot: "No district court, whether this Court or a federal court, has 'jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' ") (quoting *Liverpool, New York and P.S.S. Co. v. Commissioners*, 113 U.S. 33, 39 (1885)).

Moreover, Yniguez did not bring her lawsuit as a class action. As a result, Yniguez did not represent a class of employees. Nor did she demonstrate any other basis to support standing. Even though Yniguez brought a facial

overbreadth challenge, such a challenge does not confer standing to assert the claims of third parties unless the plaintiff presents an actual case or controversy and has standing herself. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the Court recognized that "mere[ ] prudential considerations" (such as relaxed third-party standing in First Amendment cases) do not affect the "irreducible constitutional minimum" elements of standing, which are "an essential and unchanging part of the case-or-controversy requirement of Article III." *See also Secretary of State of Maryland v. Munson*, 467 U.S. 947, 956-57 and n.7 (1984) (classifying broader third-party standing in First Amendment cases as a "lessening of *prudential* limitations on standing") (emphasis added). Therefore, after Yniguez's interest in the enforcement of Article XXVIII ceased, she could not serve as the sole representative of parties not before the Court, and the declaratory relief claim should have been dismissed.

### C. Yniguez Could Not Maintain the Nominal Damage Claim Because Article XXVIII Was Never Enforced Against Her and She Could Not Pursue a Damage Claim Against the State Under 42 U.S.C. § 1983.

The court of appeals attempted to avoid the profound mootness problem caused by Yniguez's change in circumstances by suggesting that she might seek nominal damages. (Pet. App. 94a.) Yniguez, however, never requested nominal damages from the district court, either in the first instance or when the case was returned to the district court after the decision in *Yniguez II*. Moreover,



Yniguez never had a valid claim for nominal damages, because her constitutional rights were never violated.

The district court decided only Yniguez's claim for declaratory relief. The court did not grant her claim for injunctive relief because she had not "established an enforcement threat sufficient to warrant injunctive relief." (Pet. App. 112a.) Although the court of appeals later remanded the case to the district court so that Yniguez could request nominal damages, she did not request such damages and the district court did not consider a claim for nominal damages. Following Petitioners' second cautionary notice of appeal and Yniguez's notice of cross-appeal, the court of appeals assumed jurisdiction of the appeal on the merits. But rather than acknowledging the mootness of the declaratory relief claim, the court of appeals affirmed the district court's judgment granting declaratory relief, tacking on a few paragraphs concluding that Yniguez was entitled to nominal damages. (Pet. App. 59a-60a.) The conclusion was both inconsistent with the record in this case and incorrect as a matter of law.

Although the district court found that Governor Mofford may have sufficiently threatened enforcement to justify declaratory relief, this "threat" does not constitute a violation of any rights so as to justify damages. The district court specifically noted that Yniguez's standing was limited "because there is no evidence of record to establish that Yniguez's asserted injury is anything except purely conjectural and hypothetical to the extent that it stems from any private actions of the Defendants." *Id.* Thus, *at most*, the case was based on a threatened violation, but no actual violation of Yniguez's First Amendment rights. Such a threatened violation was

insufficient to provide a justiciable controversy concerning Yniguez's nominal damage claim.

Moreover, there is no basis for Yniguez to receive any nominal damages as a matter of law. She has no possible claim against Petitioners, because they are not state actors nor did they act in concert with state actors. Her claim against the State Defendants fares no better. The Governor in her official capacity is not amenable to suit for damages under 42 U.S.C. § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 70-71 (1989). Also, because Yniguez voluntarily dropped Arizona from her Complaint and Arizona was not permitted to intervene as a *party* in the court of appeals, Yniguez could not obtain damages against Arizona. Moreover, Arizona is protected under the holding in *Will*. Thus, even the court of appeals' contrived theory does not provide any basis for jurisdiction because it is well settled that, absent at least a colorable claim arising under federal law, there is no basis for asserting jurisdiction in a federal court. *See Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *Neitzke v. Williams*, 490 U.S. 319, 327 n.6 (1989). At the time the court of appeals hypothesized a claim for nominal damages in 1992, this Court already had decided *Will*. Thus, Respondent Yniguez did not have a colorable claim for nominal damages and therefore her claim for declaratory relief could not be revived after she had voluntarily allowed it to become moot.



### D. The Case Should Be Dismissed Because the Nominal Damage Claim Was Clearly Incidental to the Declaratory Relief Claim and Manufactured Solely in a Misguided Attempt to Maintain a Case or Controversy.

The court of appeals should not have allowed Yniguez to manipulate the judicial process by raising a previously unasserted nominal damage claim in an attempt to maintain jurisdiction. The court of appeals should not have maintained jurisdiction over this moot case based solely on the possibility that Yniguez might assert a nominal damage claim, especially when Article XXVIII had never been enforced and when the sole plaintiff never requested nominal damages before the district court. Maintaining jurisdiction in this case allowed the federal courts to circumvent Article III limitations and resulted in the courts issuing advisory opinions. Moreover, the continued prosecution of this important case, the outcome of which may significantly affect the state government and employees, should not be left in the hands of a person never truly affected and certainly no longer threatened by the law under challenge. *Cf. Diamond v. Charles*, 476 U.S. 54, 62 (1986) (" 'The exercise of judicial power . . . can so profoundly affect the lives, liberty and property of those to whom it extends,' *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982), that the decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome.' *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).")

In *Alejandrino v. Quezon*, 271 U.S. 528, 533-34 (1926), this Court dismissed as moot a senator's request that his

suspension be enjoined. Although the Court raised the possibility that the senator was entitled to back salary, the Court dismissed the entire litigation because the salary issue was not briefed and his request for mandamus was not clear as to the official against whom the mandamus for back pay should issue. *Id.* at 532-34. In much the same way, in this case, Yniguez never requested or briefed nominal damages, and therefore, as in *Alejandrino*, the possibility of a nominal damage claim that is clearly incidental to the declaratory relief claim cannot save the entire litigation from dismissal. *Alejandrino* thus dictates that "where one claim has become moot and the pleadings are insufficient to determine whether the plaintiff is entitled to another remedy, the action should be dismissed as moot." *Powell v. McCormack*, 385 U.S. 486, 499 (1969) (explaining *Alejandrino*).

Other federal courts have held that an incidental, after-the-fact nominal damage claim cannot save a moot declaratory or injunctive relief claim. For example, the Second Circuit ordered dismissal of the entire litigation as moot where declaratory and injunctive relief claims were moot. *Kerrigan v. Boucher*, 450 F.2d 487 (2d Cir. 1971). As in the instant case, the lower court found that plaintiff's nominal damages claim precluded dismissal. *Id.* at 489. The Second Circuit disagreed:

> The basic proposition which plaintiff is seeking to establish is the unconstitutionality of the Connecticut statute. Not having found a justiciable controversy permitting a declaration, the claim for nominal damages, which is clearly incident to the relief sought, cannot properly be the basis upon which a court should find a case or controversy where none in fact exists.



*Id.* at 489-90; *see also Geraci v. Treuchtlinger*, 487 F.2d 590, 592 (2d Cir. 1973) (an inmate's release from prison required that his freedom of religion complaint should be dismissed as moot, even though he sought nominal monetary damages); *Fox v. Board of Trustees of State Univ. of N.Y.*, 764 F. Supp. 747, 756 (N.D.N.Y. 1991) (plaintiffs' complaint dismissed as moot; court refused to "read into plaintiffs' . . . complaint a claim for damages, nominal or otherwise, where none exists").

Allowing federal courts to preserve a moot case on appeal because of the possibility of a nominal damages claim results in federal courts deciding hypothetical cases. This case, with its tortured procedure which was based purely on conjecture as to whether Article XXVIII will ever be enforced and if so, how it will be enforced, illustrates the harm in deciding hypothetical cases that Article III is supposed to prevent.

### E. AACT Lacks Standing to Litigate This Action Against Either AOE or the State.

The court of appeals permitted AACT to intervene as plaintiff-appellees in this case after the opinion on the merits (*Yniguez III*), but before the *en banc* opinion. In doing so, the court specifically noted that "in reaching [its] decision . . . , [the court] need not rely on that group's standing as a party." (Pet. App. 11a.) Because AACT never alleged that it suffered any actual or threatened injury, AACT does not have standing to maintain this action in place of Yniguez.

To pursue this action in Yniguez's absence, AACT must demonstrate that AACT or one of its members

" 'personally has suffered some actual or threatened injury as a result of the putatively illegal conduct' of the other party." *Diamond v. Charles*, 476 U.S. at 62 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). AACT never alleged in this case that it or any of its members have suffered any actual or threatened injury as a result of either AOE's or the State's conduct. In its motion to intervene, AACT merely alleged that AACT campaigned against the ballot initiative that proposed Article XXVIII, and that AACT and AOE, the initiative's sponsor, are "political counterparts with diametrically opposed interests regarding the constitutionality of Article XXVIII." (R. C.A. 5/26/94.) Thus, AACT alleged no more than a political disagreement to support its intervention motion. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Article III requirements." *Diamond*, 476 U.S. at 63. Therefore, AACT's intervention cannot demonstrate the actual or threatened harm or the personal stake that would allow AACT to carry on this action.

## II. Petitioners Lack Standing to Maintain This Action.

### A. AOE Does Not Have Standing to Defend the Constitutionality of Article XXVIII Because, Among Other Reasons, AOE Is Not Authorized Under Arizona Law to Defend an Initiative in Federal Court.

AOE argues, and the court of appeals concluded, that AOE could be analogized to the legislature. (Petitioner's Brief on the Merits at 41-42; J.A. 166-68.) Thus, the court of appeals found that, as the principal sponsor of the



ballot initiative proposing Article XXVIII, AOE has standing to pursue this appeal, without the participation of the State, because AOE has standing to defend its "legislation." (J.A. 166-68.) Except on an extremely superficial level, however, the sponsor of a ballot initiative is not the equal of the legislature, whose members are elected by the people to represent them and which is specifically charged with the continuing duty of enacting laws. Because an initiative sponsor is not authorized under Arizona law to defend a state constitutional amendment enacted by its initiative and not elected by the Arizona voters to defend its initiative, AOE does not have standing to defend Article XXVIII's constitutionality in federal court.

This Court already has decided this issue summarily in previous litigation. *See The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company of Chicago*, 460 U.S. 1077 (1983). In that case, the Court dismissed for lack of standing an appeal by the proponents of a state initiative that had been declared unconstitutional as a violation of the Contract Clause. That disposition was triggered by the Solicitor General's argument that "where the State has litigated the validity of its law and decided to acquiesce in a holding that it is unconstitutional, it is not the prerogative of private citizens to revive the law through further litigation, even if they might benefit in an abstract way by doing so." Brief of Appellee the United States of America to Dismiss or Affirm, *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company of Chicago*, No. 82-1445 (Oct. Term, 1982). The advocacy group in that case – a self-proclaimed citizens' group that drafted and

campaigned for the initiative – is identically situated to Petitioner AOE.

Although the Court's summary disposition of that appeal is not entitled to the same stare decisis effect that a fully litigated disposition of the appeal would be, it is nevertheless controlling, absent compelling reasons not to follow it. "The precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.' " *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983). In this case, the "precise issue" decided in *Don't Bankrupt Washington* – that proponents of an invalidated state initiative lack standing to appeal when the State has decided to acquiesce in the ruling – is the identical issue presented here. *See also Meek v. Pittenger*, 421 U.S. 349, 367 n.16 (1975); Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Supreme Court Practice* 246-247 (6th ed. 1986).

Not only is there no reason to depart from the Court's summary disposition in *Don't Bankrupt Washington*, but the holding that self-appointed defenders of state law ordinarily lack standing to litigate is correct. Petitioner AOE is a citizens group that drafted and campaigned for Article XXVIII. Petitioner Park is AOE's chairman. Neither was a defendant in the suits brought by Yniguez. They intervened in the court of appeals. Whatever the merit of the decision to permit intervention, there is a clear difference between participation in a live controversy between the plaintiff and the State, and carrying the action forward alone after the State is no longer a party. In the former case, both Article III and prudential requirements are satisfied by the controversy between the original parties. In the latter situation the intervenor must



demonstrate that it has an appealable interest – that is, that it independently satisfies the traditional standing requirements.[8] In this case Petitioners cannot satisfy those requirements.

Petitioners can cite no "injury that is peculiar to [themselves] or to a distinct group of which [they are] a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.' " *Gladstone Realtors v. Village of Bellwood*, 441 U.S. at 100 (quoting *Warth v. Seldin*, 422 U.S. at 499). When injury is shared, the proper representatives of the citizenry are the State itself and its elected officials. If factions within the public are unhappy, "our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing

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[8] *See Boston Tow Boat Co. v. United States*, 321 U.S. 632 (1944); *Barry v. District of Columbia Bd. of Elections*, 580 F.2d 695, 697-98 (D.C. Cir. 1978); *United States v. Imperial Irrigation District*, 559 F.2d 509, 521 (9th Cir. 1977), *rev'd in part and vacated in part sub nom. Bryant v. Yellen*, 447 U.S. 352 (1980); Stephen M. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 753-54 (1968).

In *United States v. Imperial Irrigation District*, the court of appeals permitted a group of intervenors to appeal in an action brought by the government, after the government had decided not to appeal. 559 F.2d at 521. Although this Court upheld the intervenors' standing to appeal. *Bryant v. Yellen*, 447 U.S. at 365-68, it pointed out that the intervenors' "interest is not 'shared in substantially equal measure by all or a large class of citizens,' . . . because [they] are residents of the Imperial Valley who desire to purchase the excess land for purposes of farming." 447 U.S. at 367 n.17. In the instant case, Petitioners' interest is not unique.

duties committed to them." *United States v. Richardson*, 418 U.S. 166, 179 (1974).

Although this Court has acknowledged that a state legislature can have standing to appeal a judgment declaring a state statute unconstitutional, the Court also recognized that the legislature's standing depends on its authority under state law to defend the constitutionality of legislation in federal court. *Karcher v. May*, 484 U.S. 72, 82 (1987). Arizona law recognizes the right of its citizens to legislate, Ariz. Const. art. IV, pt. 1, § 1, and the rights and duties of the sponsors of a ballot initiative are set forth in Arizona statutes. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 19-111 (sponsor must file an application with the Secretary of State); 19-122 (Secretary of State must provide the sponsor with a written statement of reasons for rejecting his petition). The rights and duties of the initiative sponsor, however, relate only to the period before the initiative is approved by the voters. Arizona law does not authorize an initiative sponsor to defend an initiative that has been enacted into law.

Any analogy between the initiative sponsor and the legislature is flawed. The initiative sponsor, unlike members of the legislature, is merely a vehicle for placing a proposal before the voters; the voters do not elect the initiative sponsors and by voting for the initiative, do not authorize an initiative sponsor to act for them. Indeed, if parallels are drawn, an initiative sponsor – who in Arizona drafts the proposed legislation and collects the requisite number of signatures to secure its placement on the ballot – is more analogous to legislative staff and the registered voters are more analogous to the legislative body. Therefore, the court of appeals erred in concluding



that an initiative sponsor, like the legislature, has standing to appeal the district court decision declaring Article XXVIII unconstitutional.

### B. AOE's Members Do Not Have Standing to Maintain This Action and Therefore AOE Does Not Have Representative Standing.

AOE argues that it has standing by virtue of its representation of the Arizona voters who voted in favor of Article XXVIII. But AOE possesses standing to bring suit on behalf of its members only if its members would otherwise have standing to sue in their own right. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). AOE's members do not have standing to maintain this action individually, and thus AOE lacks representational standing.

Individual Arizonans who voted in favor of Article XXVIII do not have standing to defend the initiative in federal court. Any alleged harm that results from the lower courts declaring Article XXVIII unconstitutional is a " 'generalized grievance' shared in substantially equal measure by all or a large class of citizens," a grievance that does not support exercise of this Court's jurisdiction. *Warth v. Seldin*, 422 U.S. at 499. And, unlike the Petitioners in *Coleman v. Miller*, 307 U.S. 433, 438 (1939), who consisted of all the senators who had voted for a bill who sought to keep their votes from being nullified, AOE does not consist of all of the Arizona citizens who voted in favor of Article XXVIII. Thus, AOE, like the individual voters, would not have standing based on a claim of voter nullification.

Finally, an individual member of AOE does not have standing based on the member's threat to enforce Article XXVIII. The court of appeals found that Petitioner Park, the chairman of AOE, had standing apart from AOE based on the private right of enforcement conferred in Article XXVIII, § 4 and specifically found that there was more than a speculative threat that Park might bring an action to enforce Article XXVIII against Yniguez. (J.A. 169). Whatever the merit of this speculative argument at the time it was made, it plainly cannot survive now. Yniguez is no longer a state employee and, thus, whatever threat existed ended in April 1990 when Yniguez resigned. Therefore, Park, like Arizona citizens who voted in favor of Article XXVIII, does not have individual standing to maintain this action against Yniguez.

### C. AOE Has Not Suffered Injury Under Traditional Criteria.

AOE also argues that the time and money it spent promoting the initiative satisfy the injury requirement under Article III. This harm is too indirect to satisfy Article III. *See Diamond v. Charles*, 476 U.S. at 70 (petitioner's liability for attorney's fees in lower court does not confer standing to challenge abortion law because the liability for fees is a consequence of petitioner's decision to intervene, but could not be traced to the Illinois abortion law). AOE's efforts were designed to put Article XXVIII on the ballot and to persuade voters in Arizona to enact it. Those goals were fully satisfied when AOE's proposed initiative was placed on the ballot and then enacted into law by the Arizona voters. This lawsuit did



not interfere with AOE's ability to get the initiative before the voters or enacted into law. Therefore, AOE's expenditure of time and money to obtain voter approval of Article XXVIII does not confer standing to defend the constitutionality of Article XXVIII.

Petitioners claim that they have suffered actual injury because AOE's members' right to privately enforce Article XXVIII under section four of the Article has been eliminated. If the Court vacates the court of appeals decision,[9] Petitioners' rights will be unaffected because AOE was not a party to the district court action and therefore would not be bound by that action. Moreover, the degree of stare decisis arising from an unappealed district court decision is insufficient to show actual injury, as the district court decision is not binding on the Arizona courts. *See Moore v. Sims*, 442 U.S. 415, 428 (1979). Standing cannot be predicated upon a mere interest in establishing legal precedent. *Imperial Irrigation Dist.*, 559 F.2d at 521.

## III. The Court Should Vacate the Court of Appeals' Decision.

The court of appeals' unswerving desire to resolve this case on the merits despite the parties' absence of a continuing stake in the outcome has created a more muddled jurisdictional situation than any previously resolved

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[9] If the Court does not vacate the Ninth Circuit decision, however, AOE's members are foreclosed from filing suit to enforce Article XXVIII under section four. *See H.L. v. Matheson*, 450 U.S. 398, 406 (1981) (where the state was a party to the district court decision, the state was bound by a decision that it did not appeal).

by this Court. There are two legal problems posed here. First, does the Petitioners' lack of standing deprive this Court of all jurisdiction to take any action vis-a-vis the judgment below; and second, if not, is vacatur nevertheless an appropriate remedy in the novel circumstances posed here? The answer to the first question is "no" and the answer to the second question is "yes."

With respect to Petitioners lack of standing, the Court has long recognized that, even when it is powerless to resolve the merits of a case because it lacks jurisdiction, it nevertheless "may make such disposition of the whole case as justice may require." *Walling*, 321 U.S. at 677. Thus, the Court has authority in its discretion simply to dismiss the appeal or to decide that the underlying judgment warrants vacatur. The jurisdictional restrictions on the Court do not impose "paralysis" in this situation. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390 (1994).[10]

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[10] Even if the Court doubted its authority to do justice in the face of Petitioners' lack of standing, it still could assume Petitioners' standing for purposes of argument and hold that Respondent Yniguez's claim has become moot. The rationale for this approach is that the mootness of Respondent's claim is significantly easier to decide than the question of Petitioners' standing. This Court has assumed a principle of law on a difficult issue in order to dispose of the case on a simpler and more pointed question. *See, e.g., Norton v. Mathews*, 427 U.S. 524 (1976); *Philbrook v. Glodgett*, 421 U.S. 707, 721-22 (1975). *See also Browning-Ferris Industries v. Muszynski*, 899 F.2d 151, 155 (2d Cir. 1990) (noting the court's "practice of avoiding difficult and sweeping jurisdictional questions in favor of deciding clear-cut and narrower issues . . . "). Following that course here would allow the Court to turn directly to the issue of vacatur.



The second problem posed here by the jurisdictional defects falls somewhere between the traditional *Munsingwear* situation, where mootness arises "by happenstance" and the proper disposition is to vacate the entire case, and the *Karcher v. May* situation, where the Court was satisfied to dismiss the appeal and not vacate the underlying judgment. *See also U.S. Bancorp*, 115 S. Ct. at 391-93 (refusing to permit vacatur after voluntary settlement between parties).

The Court has set out "[t]he principles that have always been implicit in our treatment of moot cases . . . " in deciding whether vacatur is appropriate. *Id.* at 391. The Court's disposition should be "in the manner most consonant to justice . . . in view of the nature and character of the conditions which have caused the case to become moot." *Id.* (quoting *United States v. Hamburg-Americkische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477-478 (1916), quoting *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 302 (1892)). The mootness and general lack of justiciability of this case is a function of Yniguez's voluntary act of quitting, accompanied by "happenstance" and errors committed by the courts below. The "just" solution is, therefore, to vacate and simply wipe this sorry episode of litigation away.

The fairness of vacatur becomes plain when the circumstances giving rise to the jurisdictional problems are examined with some care. Respondent Yniguez voluntarily left the State's employ, which caused her claim to become moot. To be sure, this is not precisely the "happenstance," such as death, that creates the strongest basis for applying *Munsingwear*. Nevertheless, while Yniguez's

action may not have been motivated to affect the litigation, she nonetheless should not be permitted to benefit by her act. It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action to moot the dispute, and then retain the judgment on the basis that the mootness was not mere "happenstance."

Arizona's position in this litigation is not without its own problems. The Governor initially decided not to appeal the district court's judgment, which is what created the need to find some "defendant-appellant." To its credit, however, the State, through the Attorney General, sought to intervene after judgment to defend Article XXVIII's constitutionality. That motion was denied because the Attorney General was deemed estopped to reenter the litigation. Putting aside the issue of the reasonableness of that decision, the State did all that it could to untangle the jurisdictional problems. It came forward and offered itself as a litigant with unquestioned standing to defend the State's law and it brought the mootness issue to the attention of the court of appeals. Under these circumstances, the ends of justice are not served by allowing Article XXVIII to be declared unconstitutional and have that declaration remain unreviewed by this Court.

To be sure, a judgment is entitled to considerable respect and vacatur must be justified. *U.S. Bancorp Mortgage Co.*, 115 S. Ct. at 392. But the public interest is not served by permitting a judgment to be entered on a constitutional issue of public importance where the requirements of Article III are so cavalierly ignored and then deeming that judgment unreviewable and even



untouchable by this Court. Justice demands that the judgment be vacated and the case remanded so that the Complaint can be dismissed.

* * *

This case has followed a tortured path and, in the short run, the State of Arizona might be better served by having this Court decide the merits of the First Amendment issues posed by Article XXVIII. Certainly the resources of the State would be conserved. But the State cannot turn a blind eye to the severe jurisdictional problems posed by the case as it comes to this Court. Respondent Yniguez's claim is moot and has been for years. In that circumstance, the only proper course is to wipe the slate clean and insist that a new litigant with a justiciable interest come forward to pursue the matter afresh. Any other course might provide some immediate relief to the litigants now before the Court, but would do inestimable harm to Article III. That price is too high.

## CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for entry of dismissal of the Complaint.

Respectfully submitted,

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No. 95-974

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In The

# Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

*Petitioners,*

v.

STATE OF ARIZONA; MARIA-KELLY F. YNIGUEZ; JAIME P. GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

*Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

## BRIEF FOR RESPONDENT MARIA-KELLY F. YNIGUEZ

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## QUESTIONS PRESENTED FOR REVIEW

1. Do petitioners have standing to maintain this action?*
2. Is there a case or controversy with respect to respondent Yniguez?*
3. Whether a State may constitutionally impose a blanket prior restraint on non-English work-time speech by legislators, judges and all other government employees, regardless of the content, context or audience.
4. Whether an Arizona constitutional amendment which prohibits any government use of non-English languages violates the First and Fourteenth Amendment rights of Arizona citizens who are able to communicate only in a non-English language.

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* Pursuant to this Court's order of March 25, 1996.

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## STATEMENT OF THE CASE

### A. Yniguez' Duties in the Workplace.

Kelly Yniguez just wanted to do her job. Beginning in 1984, Kelly acted as an insurance claims manager with the State of Arizona Risk Management Division of the Department of Administration. (Y.A. 4-5) Kelly's official duties required her to administer medical malpractice claims asserted against either the State of Arizona or physicians for whom the State provided insurance on a self-insurance basis. (Y.A. 4-5)

Kelly is Hispanic and is fluent and literate in both English and Spanish. (Y.A. 5) Her language facility permitted her to directly communicate with citizens who were monolingual Spanish speakers or who did not have sufficient ability to communicate in English. (Y.A. 5-6) While performing her job, Kelly conducted interviews in Spanish with monolingual Spanish speakers concerning both medical malpractice claims and employment discrimination allegations against the State. (J.A. 45-46) Kelly used Spanish to document and communicate decisions to pay, settle or deny Spanish-speaking citizens' claims against the State of Arizona. (J.A. 46) All Spanish language documents Kelly prepared involving claims made by monolingual Spanish speakers, were accompanied by English translations. (Y.A. 17-18)

Before passage of Article XXVIII, in the course of acting as a State employee, Kelly spoke English to persons who spoke only English, Spanish to persons who spoke only Spanish and a combination of both languages to persons who were able to communicate in both. (Y.A. 5-6) Kelly communicated in both Spanish and English to those whose command of English was not sufficiently well-developed to understand all the English language expressions and ideas Kelly desired to communicate. (Y.A. 5-6) At times during her job, Kelly also communicated in Spanish to persons who spoke both English and Spanish because the emotive ideas and feelings she

desired to express were most clearly expressed in Spanish. (Y.A. 5-6) The State acknowledges that Kelly communicated in Spanish to express otherwise inexpressible concepts and ideas. (Y.A. 6)

The State stipulated that Kelly's use of a non-English language contributed to the efficient operation and administration of the State. (Y.A. 6) Indeed, the State made a binding factual admission that it had "no legitimate purpose in restricting Maria-Kelly F. Yniguez from using the Spanish language in the course of her performing government business." (Y.A. 10)

### B. The Impact of Article XXVIII.

State personnel rules and loyalty oaths compel all government employees to obey the Constitution and laws of the State of Arizona. (J.A. 20-21; Y.A. 7-8) Failure to obey State laws and the Constitution subjects employees, including Kelly, to employment sanctions. (Y.A. 7-8) Kelly believed that, after the passage of Article XXVIII, State employee disciplinary rules required her to either refrain from speaking Spanish or face sanctions, and potential termination. (J.A. 52)

Not only did then-Arizona Governor Rose Mofford declare that she intended to enforce Article XXVIII, but the State stipulated that Governor Mofford "expects State service employees to comply with Article XXVIII." (Y.A. 8) These facts led Kelly to believe that she would endure sanctions if she spoke Spanish in the workplace. (J.A. 52) In addition, threatening letters from members of the public prompted Kelly to believe she would face potential lawsuits for speaking Spanish. (Y.A. 14-15) As a consequence, after Article XXVIII was passed, Kelly voluntarily stopped speaking Spanish in her workplace. (Y.A. 14-15)

### C. The District Court Proceedings.

Legitimately fearing either employment sanctions or suit if she continued to use Spanish, Kelly restricted her



on-the-job vocabulary solely to English and initiated this action. (Y.A. 14-15) Pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 2000(d), *et seq.*, she sought, *inter alia*, declaratory relief. (J.A. 55-60) Kelly named Arizona's then-Governor, Rose Mofford, and Attorney General, Robert K. Corbin, and the State itself as defendants. (J.A. 56) The State was dismissed on its own Motion and Kelly amended her complaint to add State Senator Jaime Gutierrez, a bilingual State Senator representing a district with numerous non-English citizens, as a plaintiff. (J.A. 55-60)

Pursuant to Stipulation, the hearing on Kelly's Motion for Preliminary Injunction was consolidated with trial on the merits. (J.A. 2)

Senator Gutierrez testified that Article XXVIII was aimed at a segment of the Arizona population comprised of minority group members. (J.A. 78-79) He also testified that he communicated with his constituents in Spanish while performing State business. (J.A. 78-79)

Jane Hill, Ph.D., a linguistic anthropologist and State-employed professor at the University of Arizona testified without controversion and as an expert that:

a. Restricting language use results in the contraction of the full range of expression that multilingual persons have absent such restriction;

b. Article XXVIII has a disparate impact on minorities in Arizona particularly Spanish speakers and speakers of Native American languages;

c. Her occasional use of Spanish in her anthropology classroom exposes her to claims that she has violated Article XXVIII;

d. Language functions to represent emotions, manipulate social contacts, to represent aesthetic reactions and to represent personal identity; and

e. The Spanish language is an important marker of ethnic identity among Spanish speakers in Arizona.

(J.A. 80-83)

Following trial, the District Court granted Attorney General Corbin's Motion to Dismiss the Complaint against him. (J.A. 2) Finding that "Yniguez has met the requirement of an injury in fact to the extent that she asserts an injury resulting from Governor Mofford's Official Actions" the District Court entered judgment in favor of Kelly declaring Article XXVIII void as facially invalid in violation of the First Amendment. (Pet. for Cert. 106a) The District Court never reached Kelly's contentions that Article XXVIII was invalid as a denial of equal protection and due process.[1] (J.A. 200) Shortly after entry of that judgment, Governor Mofford, the only party defendant to the judgment, announced that she would not appeal the District Court's decision. (J.A. 95) Because the Governor did not appeal from the District Court's final judgment, Kelly elected not to challenge the District Court's failure to award her nominal damages at that time. (J.A. 200)

Governor Mofford's decision not to appeal prompted Arizonans for Official English and Robert D. Park (collectively, "AOE") to seek leave to intervene post-judgment for the sole and express purpose of "taking an appeal". (J.A. 95) Notwithstanding the mandate of Rule 24(c) of the Federal Rules of Civil Procedure, AOE provided no pleading setting forth the claim or defense for which it sought intervention. (J.A. 125) Shortly thereafter, and despite having successfully obtained the dismissal he had

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[1] The District Court found that "Yniguez is entitled to a judgment pursuant to 28 U.S.C. § 2201 declaring Article XXVIII unconstitutional as violative of the First Amendment. Having so found, the Court does not reach the Plaintiff's claim that Article XXVIII also violates the Fourteenth Amendment and 42 U.S.C. § 2000(d), *et seq.*" (Pet. for Cert. 111a.)



requested on behalf of both himself and the State, Attorney General Corbin sought to reinsert himself into the proceedings, substitute his wishes for the official decision of his client, Governor Mofford, and appeal the judgment to which he was not a party. (J.A. 141)

The District Court denied both motions for intervention. (J.A. 148-49) AOE and the Attorney General appealed that order to the Ninth Circuit. (J.A. 3, 150)

**D. Decision on Intervention.**

The Ninth Circuit reversed the District Court's denial of AOE's motion to intervene, affirmed the District Court's denial of the Attorney General's intervention motion insofar as he sought to be designated as a party to the appeal, and allowed the Attorney General to argue the constitutionality of Article XXVIII pursuant to 28 U.S.C. § 2403(b). (J.A. 183) As a part of its opinion, the Ninth Circuit noted it would retain jurisdiction over the merits of the appeal. (J.A. 183-84)

**E. The Mootness Determination.**

After the Ninth Circuit issued its intervention opinion on July 19, 1991, it issued a mandate on August 14, 1991. (J.A. 185) Shortly thereafter, the State filed a "Suggestion of Mootness" in the Ninth Circuit noting that Kelly had resigned from State employment on April 20, 1990. (J.A. 187) Six days after the State's filing, AOE moved the Court to recall the mandate. (Y.A. 19-27) The Ninth Circuit subsequently rejected the State's Suggestion of Mootness, noting that the proper procedure following reversal of the District Court's denial of AOE's Motion for Leave to Intervene was for AOE to file a Notice of Appeal with the District Court.[2] (Pet. for Cert. 94a-95a) In the same opinion, the Ninth Circuit denied

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[2] Thus, Kelly was entitled to file a cross-appeal of the District Court's failure to award damages.

AOE's Motion to Recall the Mandate. (Pet. for Cert. 96a) Notwithstanding the August 20, 1991 entry on the District Court docket of the Ninth Circuit's Order permitting intervention, AOE did not file a Notice of Appeal until December 3, 1992 – nearly 15 months later. (J.A. 206) Kelly thereafter filed a timely notice of cross-appeal on December 15, 1992. (J.A. 209) The State filed no appeal on the merits.

On March 16, 1993, the District Court awarded Kelly her attorneys' fees for obtaining the unappealed judgment against Governor Mofford. (J.A. 4) The State, having a statutory obligation to pay those fees, conditionally appealed the fee award. (J.A. 4, 5) The Ninth Circuit consolidated that appeal with AOE's appeal and Kelly's cross-appeal. (J.A. 8)

**F. Panel Decision on the Merits.**

AOE and Kelly briefed and argued the merits before the Ninth Circuit. Following oral argument, Arizonans Against Constitutional Tampering and Thomas Espinoza (collectively, "AACT") sought leave to intervene as a party plaintiff. (J.A. 14) The Ninth Circuit granted that motion on June 21, 1994. (J.A. 14) On December 7, 1994, a three-judge panel affirmed the District Court's decision on the merits, finding Article XXVIII unconstitutional in violation of the First Amendment. (J.A. 14) Shortly thereafter, the State voluntarily waived its Eleventh Amendment immunity from the award of nominal damages, moving the Court to modify its opinion consistent with the waiver. (Pet. for Cert. 59a; Y.A. 28-32)

**G. The En Banc Opinion.**

On re-hearing en banc, the Ninth Circuit concluded that the initial three-judge panel opinion was correct and essentially re-issued that opinion. (Pet. for Cert. 1a) The opinions recognized the State's express waiver of its Eleventh Amendment immunity to the award of nominal



damages. (Pet. for Cert. 59a) No party sought a stay of the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure. Accordingly, the cause was remanded to the District Court on October 27, 1995 and on November 7, 1995 the District Court entered its judgment awarding Kelly nominal damages in the amount of $1.00. (J.A. 211) No party appealed that judgment.

On December 20, 1995, AOE submitted its petition for writ of certiorari. This Court granted certiorari on March 25, 1996. (J.A. 212) In its Order granting certiorari, this Court specifically requested briefing and argument of the following questions:

1. Do petitioners have standing to maintain this action?
2. Is there a case or controversy with respect to respondent Yniguez?

(J.A. 212)

## SUMMARY OF ARGUMENT

AOE is now the only party adverse to Kelly Yniguez in this Court. The only parties ever having a case or controversy with Kelly, however, were the State and Governor Mofford. When the Governor declined to appeal the District Court's judgment and when the State failed to appeal the nominal damages judgment against it and refused to join in AOE's petition for certiorari, the lower courts' judgments became final, and all cases and controversies involving Kelly's actions were resolved.

AOE has no standing to maintain this action. Its abstract injury – that its efforts to place an "English Only" law on the ballot were nullified – cannot be attributed to any misconduct by Kelly. AOE is simply philosophically opposed to the District Court's decision. No matter how passionate its interest in urging the validity of Article XXVIII, AOE does not have a concrete interest or direct stake in the outcome of this litigation. It, therefore, does not have sufficient standing to support a petition for certiorari.

This case is presented to this Court as a Section 1983 case without a state actor. 42 U.S.C. § 1983 creates a remedy, enforceable by citizens, for violations of federal rights committed by persons acting under color of state law. The State and its officials were the only persons against whom Kelly sought or obtained relief. AOE was not, and could not have been, a party to the Section 1983 action Kelly initiated in District Court. Without a state party, AOE has no standing to pursue this case.

Neither the State nor AOE briefed the issue of this Court's question of whether a case or controversy exists with respect to Respondent Yniguez. Instead, both argue that Kelly's resignation from State employment – after the unappealed judgment against Governor Mofford became final and binding – rendered this case moot. The unappealed judgment for nominal damages in Kelly's favor, however, insulates this action from mootness.

This Court has long-held that nominal damages are appropriate in civil rights cases where absolute rights are violated. The District Court specifically held that Kelly suffered an "injury in fact . . . resulting from Governor Mofford's official actions", yet it failed to award her nominal damages. Kelly's injuries, however, fully qualified her for an award of nominal damages and she filed a timely cross-appeal. As a result, Kelly's claim for nominal damages was viable even after her resignation.

Both AOE and the State assert that all lower courts' decisions should be vacated due to lack of standing or mootness. Vacatur is not justified in this case. The District Court awarded Kelly a final binding judgment against Governor Mofford. That judgment is final and binding because the Governor never appealed. It cannot be vacated.

In addition, the Ninth Circuit opinion cannot be vacated – even if AOE had no standing to intervene or appeal. A viable case or controversy existed between



Kelly and the State throughout the Ninth Circuit proceedings. Under 28 U.S.C. Section 2403(b), the State maintained a justiciable interest in the merits at the Ninth Circuit. The State expressly waived its immunity in connection with the District Court's award of nominal damages. Later, it did not appeal from the judgment awarding those damages. Moreover, the State neither petitioned this Court for a writ of certiorari nor joined in AOE's petition. Instead, it acquiesced in the Ninth Circuit's ruling. As a result, Kelly has a final unappealed judgment against the State for her award of nominal damages. Neither of the lower courts' decisions may be vacated because the State parties bound by those decisions did not appeal. The equitable doctrine of vacatur is not available to those who voluntarily forego traditional appellate remedies.

The issue on the merits is how far a government may go in repressing settled First Amendment rights – in particular, elected officials' rights to communicate with their constituents. The plain language of Article XXVIII demonstrates the breadth of its prohibitions. It precludes elected and appointed officials from selecting the language they deem appropriate to perform their jobs. Its restrictions affect legislators, judges, and elected officials, as well as every clerical and administrative State employee.

Article XXVIII is a content-based prior restraint. It is therefore subject to strict scrutiny. At the very least, however, this Court should apply the heightened balancing test it established last year in *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995). Under the *NTE* test, the Court must evaluate both the government employee's interests in communicating freely as well as the interests of possible recipients of those communications. The record establishes that any interests AOE asserts are substantially outweighed by the government speakers' First Amendment rights and the recipients' rights to receive their communications.

Even if this Court applies the less-stringent balancing test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), Article XXVIII fails to pass constitutional muster. AOE simply has nothing to place on the scales in support of the government's interest in efficiency. Not only did the State stipulate that Kelly's use of Spanish contributed to the efficient operation and administration of the State, but no evidence in the record suggests that Article XXVIII aids the State's efficiency in any manner. Indeed, the State admitted that it had "no legitimate purpose" in restricting Kelly's use of Spanish on the job.

In addition to alleging Article XXVIII's First Amendment infirmities, Kelly argued in the District Court that Article XXVIII violates the Fourteenth Amendment. Although the District Court limited its analysis to First Amendment issues, this Court may view Article XXVIII's flaws under the Fourteenth Amendment as well. Article XXVIII imposes a broad and indiscriminate disability on non-English speakers. The only apparent motive for its existence is to demonstrate an intolerance for non-English speakers and to limit their participation in State government. Article XXVIII offends the Fourteenth Amendment and its promises of equal protection under the Constitution.

## ARGUMENT

### I. AOE HAS NO STANDING TO MAINTAIN THIS ACTION

#### A. AOE Lacks Article III Standing.

AOE is not bound by the District Court's judgment. The only defendant subject to the judgment is then-Governor Mofford. Yet she chose not to appeal and has not been a party to these proceedings for more than six years. After successfully intervening under 28 U.S.C. § 2403(b) for purposes of arguing constitutionality, the only government opponent on appeal was the State of Arizona. But the State chose not to join in the petition for writ of



certiorari and voluntarily "acquiesced in [the] holding" of the Ninth Circuit. (AZ Brf. at 25.) As a consequence, AOE stands before this Court as the only intervenor seeking review. AOE must therefore meet traditional standing requirements. *See, e.g., Fisher v. Tucson Sch. Dist. No. 1*, 625 F.2d 834, 837 n.1 (9th Cir. 1980) ("While a party need not meet all of the traditional standing requirements in order to intervene in an action, these become necessary if he is the only appellant. . . . "); *Legal Aid Soc'y of Alameda County v. Brennan*, 608 F.2d 1319, 1328 n.9 (9th Cir. 1979), *cert. denied, Chamber of Commerce v. Legal Aid Soc'y of Alameda County*, 447 U.S. 921 (1980) ("Since the federal defendants have acquiesced in the judgment against them, appellants must demonstrate such a stake in the outcome of an appeal that a live Article III case or controversy remains for appellate resolution.").

This Court has observed that standing involves constitutional limitations on federal court jurisdiction:

> [i]n its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . . . "

*Warth v. Seldin*, 422 U.S. 490 (1975) (emphasis in original; citations omitted).

Addressing the case or controversy requirements of Article III standing, this Court has recognized an "irreducible minimum":

> (1) an injury in fact;
> (2) a causal relationship between the injury and the challenged conduct; and
> (3) a likelihood that the injury will be redressed by a favorable decision.

*United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 116 S. Ct. 1529, 1533 (1996). Independent limitations on an association's standing were set forth in *Hunt v. Washington State Apple Advertising Comm'n*:

> we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

432 U.S. 333, 343 (1977).

The first prong of the *Hunt* associational standing test is grounded in Article III's constitutional requirement of a case or controversy. *Warth*, 422 U.S. at 511. Thus, for AOE to maintain this action, it must first demonstrate that each of its members has a personal stake in the outcome of this controversy – that is to say they each suffer some actual or threatened injury due to Kelly's conduct. *See Hunt*, 432 U.S. at 343. This AOE cannot do.

Furthermore, AOE's only stated purpose was to have Article XXVIII on the ballot and promote its passage. (J.A. 97) AOE has never asserted or proven an organizational interest in *enforcing* Article XXVIII. It simply cannot meet associational standing requirements.



The only injury AOE alleges is that the declaratory relief invalidating Article XXVIII as between Kelly and Governor Mofford rendered "for naught" the labors and resources it expended to promote the Article. The District Court readily rejected that argument:

> [t]he court does not believe under these circumstances that the mere fact that an organization is a proponent of an initiative proposition and has an abstract concern that is affected by the adjudication, is sufficient to create the concrete injury necessary for non-representational organizational standing. (J.A. 145)

The District Court was well supported in its determination. *Gladstone, Realtors v. Village of Belwood*, 441 U.S. 91, 99-100 (1979); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226-27 (1974) (holding that plaintiffs did not have standing to sue either as citizens or taxpayers for declaratory relief establishing that membership in the Armed Forces Reserve constituted an office prohibited to members of Congress under the Constitution).

Here, the only concrete case or controversy was between Kelly and Governor Mofford. When the Governor refused to appeal and the State intervened to argue the constitutionality of Article XXVIII, the case or controversy shifted from Kelly and the Governor to Kelly and the State. At no time did Kelly seek any relief against AOE. Likewise, AOE never sought relief against Kelly. Even the abstract "injury" AOE purportedly suffered – that its efforts were nullified – is not attributable in any way to any alleged misconduct by Kelly. No matter how passionate AOE's interest in urging that Article XXVIII is valid, that interest does not equate to the standing necessary to support this action. *See Diamond v. Charles*, 476 U.S. 54, 62 (1986).

In *Diamond*, a physician who had properly intervened in the trial court petitioned this Court to review the trial court's determination (affirmed by the Seventh Circuit)

that portions of the Illinois Abortion Law of 1975 were unconstitutional. The State of Illinois chose not to appeal those adverse determinations, despite the fact that its own statute was at stake. This Court refused to grant standing to the physician proponent of the statute:

> [b]ecause a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense, we dismiss the appeal for want of jurisdiction.

476 U.S. at 56. Indeed, relying on the "case or controversy" requirement of Article III of the Constitution, this Court declared:

> [t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements. This court consistently has required, in addition, that the party seeking judicial resolution of a dispute "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" of the other party.
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> * * *
>
> The decision to seek review must be placed "in the hands of those who have a direct stake in the outcome". It is not to be placed in the hands of "concerned bystanders" who will use it simply as a "vehicle for the vindication of value interests."

*Id.* at 62. (citations omitted) *Diamond* established that a simple philosophical interest in the outcome of litigation is insufficient to confer standing. AOE, therefore, must show both a concrete interest and a direct stake in the outcome of the litigation. It, however, has neither. AOE cannot even satisfy its burden of demonstrating that there is some injury which is likely to be redressed by a favorable decision. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). All it has is the abstract desire that this Court validate Article XXVIII as written. (J.A. 97) In the



absence of any other defendant, AOE is simply unable to demonstrate the standing necessary to permit it to seek review of the judgments and decisions below.

### B. In Addition to Its Inability to Meet the "Case or Controversy" Requirements of Article III, AOE's Position Contravenes Prudential Limitations on Standing as Well.

This Court best described prudential limitations on standing in *Gladstone, Realtors*:

> [e]ven when a case falls within these constitutional boundaries, [i.e., the plaintiff has personally suffered some actual or threatened injury due to the putative conduct of the defendant giving rise to an Article III case or controversy] a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights will be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim. For example, a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than "shared in substantially equal measure by all or a large class of citizens."

441 U.S. at 99-100 (citation omitted).

Here, AOE's claim that it is injured – because the District Court's judgment nullified its members' votes – is shared in substantially equal measure by the majority of Arizona citizens who cast a ballot on the initiative. AOE can predicate its standing neither upon an interest in the establishment of legal precedent nor upon the possibility that the declaratory relief could adversely affect AOE's interest. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982); *In re Benny*, 791 F.2d 712, 721 (9th Cir. 1986). Under the circumstances, this Court's prudential limitations on

standing compel the conclusion that AOE may not properly pursue this action.

AOE also failed to file a separate pleading as required by Rule 24(c) of the Federal Rules of Civil Procedure. Courts have held such a failure to be fatal. *Miami County Nat'l Bank v. Bancroft*, 121 F.2d 921, 926 (10th Cir. 1941); *LeBrect v. O'Hagan*, 394 P.2d 216, 217 (Ariz. 1964). Post-judgment intervenors have an obligation to set forth their interests with clarity to permit courts to ascertain whether they have established some concrete interest or right which will not be adequately protected or enforced unless intervention is granted. *Hobson v. Hansen*, 44 F.R.D. 18, 25 (D.D.C. 1968).

Here, AOE filed no pleading articulating how it was injured by Kelly's actions or the District Court's judgment. It made no claims and asserted no defenses to Kelly's complaint. The information AOE provided Kelly and the courts concerning its interest demonstrated that it is simply philosophically opposed to the District Court's judgment. Who AOE's members are, what their interests are, and how they are purportedly impaired by the District Court's judgment are unknown.

Moreover, because Kelly never spoke Spanish or otherwise violated Article XXVIII after its adoption, AOE could not have properly sued her even under the private right of action granted in Section 4 of the Article. AOE's wholesale failure to allege, and inability to prove, any particularized injury is fatal to its standing.

### C. AOE's Status as an "Initiative Proponent" Does Not Confer Standing.

AOE urges that, as the principal sponsor of the initiative proposing Article XXVIII, it has independent standing to maintain this action. (Pet. Brf. 41-42) Notwithstanding the State's absence, AOE contends that its status as an initiative proponent alone is sufficient to



satisfy Article III's case or controversy mandate. According to AOE, it stands in a position analogous to a legislator defending its legislation from constitutional attack. (J.A. 166-68) Under scrutiny, however, this analogy disintegrates.

Citizens elect representatives to enact legislation on their behalf. Arizona's citizens neither elected AOE's members nor charged them with the duty of proposing any initiative. Moreover, Arizona law did not authorize AOE to defend the initiative from attack, nor did the people elect AOE to do so. The mere fact that AOE proposed an initiative does not cloak it with any special standing to defend that initiative in court. *See Diamond v. Charles*, 476 U.S. 54 (1986)

Although AOE suggests that this Court has previously "recognized initiative proponents as representatives to defend the statutes they proposed," the cases it cites do not support that proposition – at least insofar as Article III standing is concerned. (Pet. Brf. 43) In both *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), a state party with incontrovertible Article III standing remained a party to the appellate proceedings. As a consequence, it was not necessary for the initiative proponents themselves to independently satisfy Article III's case or controversy mandate. *Crawford v. Board of Education*, 458 U.S. 527 (1982), dealt not with associational standing to defend a ballot initiative, rather it involved a class action suit brought by minority students subject to mandatory busing orders. AOE does not cite any case where this Court has directly held that an organization's status as an initiative proponent is sufficient to confer Article III standing on that organization to defend its initiative. In fact, the opposite appears to be true.[3] AOE's

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[3] *See The Don't Bankrupt Washington Comm. v. Continental Ill. Nat'l Bank and Trust Co. of Chicago*, 460 U.S. 1077 (1983). There,

status as an initiative proponent does not meet the standing requirements constitutionally imposed by Article III.[4]

## II. THERE IS NO JUSTICIABLE CASE OR CONTROVERSY BETWEEN MS. YNIGUEZ AND AOE.

Throughout the trial and appellate phases of this case, there was a concrete case or controversy between the State (including Governor Mofford) and Kelly. The controversy with respect to the declaratory relief Kelly sought ended when Governor Mofford did not appeal and the District Court's judgment became final. (J.A. 93)

### A. Because AOE Was Never A Party to the Judgments, It Has No Right to Appeal.

AOE intervened in this proceeding after the District Court rendered its judgment against Governor Mofford. AOE did not seek to amend the judgment to become a party thereto. It is not a party to any judgment. Nor is it bound by any judgment. AOE, therefore, may not appeal the District Court's judgment.[5] *See United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917) (holding that a state which sought post-judgment intervention was not a party to the record in the trial court and could not appeal the judgment); *see also Karcher v. May*, 484 U.S. 72 (1987)

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this Court determined that proponents of a state initiative that had been declared unconstitutional as a violation of the Contracts Clause lacked standing to appeal where the state acquiesced in the holding that the initiative was unconstitutional.

[4] In contrast, Respondent AACT's members include Arizona legislators and State employees whose individual rights are directly impacted by Article XXVIII.

[5] Even if it were entitled to appeal, AOE did not do so until nearly 15 months after the mandate issued permitting their appeal. Thus, AOE's appeal was untimely in any event.



(finding that one who is not a party or has not been treated as a party to a judgment has no right to appeal).

Where a state fails or declines to appeal and the case or controversy between the state and a citizen ends, no other person is able to continue the litigation by petitioning for certiorari. *Diamond v. Charles*, 476 U.S. 54 (1986); *see also Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786, 789-90 (6th Cir.), *cert. denied*, 434 U.S. 852 (1977) (holding that where a party to a judgment fails to appeal, the judgment is unassailable). As a result, AOE is an inappropriate party in this proceeding.

### B. AOE Is Not, and Has Never Been, A Person Acting Under Color of State Law with Respect to the Subject Matter of Ms. Yniguez's Complaint.

42 U.S.C. § 1983 creates a remedy, enforceable by citizens, for violations of federal rights committed by persons acting under color of state law. The elements of a Section 1983 action are (i) a person acting under color of State law; (ii) a deprivation of rights, privileges or immunities under the Constitution and laws affecting the complainant; and (iii) such deprivation must be caused by the person acting under state law. *Howlett v. Rose*, 496 U.S. 356, 358 n.1 (1990); 42 U.S.C. § 1983.

In this Section 1983 case, the State and its officials were the only persons against whom Kelly sought or obtained relief. Kelly's complaint stated no claim or cause of action against AOE or any of its members. It alleged no illegal conduct on the part of AOE and sought no relief against AOE. Similarly, AOE has never alleged that Kelly violated Article XXVIII and it has never sought relief against Kelly under Article XXVIII.

AOE's endorsement of Article XXVIII and its activities in urging its adoption were no more than private activity. Section 1983 does not give private persons such

as Kelly a cause of action against other private citizens who are acting solely in their private capacities without a jointly engaged State official. *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (holding that no Fourteenth Amendment state action and no Section 1983 cause of action exists against private conduct even though such conduct may abridge individual rights); *see also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978) (finding that the "total absence of overt official involvement" precludes a party from maintaining a Section 1983 action). From its outset to its conclusion in the Ninth Circuit, the only case or controversy in this proceeding was between Kelly and State officials.

## III. ALTHOUGH ARIZONA'S BRIEF ARGUES MOOTNESS (AN ISSUE THIS COURT DID NOT RAISE), MS. YNIGUEZ'S CLAIMS ARE NOT MOOT.

Neither AOE nor the State addressed the second question this Court posed in granting certiorari. Instead of confronting the issue of whether a case or controversy exists with respect to Respondent Yniguez, both AOE and the State raise a "mootness" argument relating to Kelly's post-judgment resignation from state employment *after* Governor Mofford's appeal time expired.[6]

AOE concedes what this Court's decisions specifically implicate, that Kelly's damages claim is sufficient to preclude mootness. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989); (Pet. Brf. 48-49) In contrast, the State urges that, notwithstanding the unappealed final District Court judgment awarding Kelly nominal

[6] Pursuant to 28 U.S.C. § 2403(b), the *only* matter properly presentable by the State in this proceeding is argument on the constitutionality of Article XXVIII. Ironically, constitutionality is left untouched by the State's brief.



damages, this action is nevertheless moot.[7] (J.A. 211) The State's argument is threefold. First, the State essentially contends that Kelly suffered no injury, and therefore was not entitled to nominal damages. Second, the State argues that Governor Mofford in her official capacity was immune from a suit for damages, including nominal damages. Finally, the State suggests that Kelly's nominal damages claim was only incidental to her claim for declaratory relief and hence is insufficient to avoid mootness. None of these arguments withstands analysis.

The District Court directly held that Kelly suffered an "injury in fact to the extent she asserts an injury resulting from Governor Mofford's official actions." (Pet. for Cert. 102a) As a consequence, she was given declaratory relief. This Court has long recognized that nominal damages are appropriate in civil rights cases where absolute rights are violated:

> [c]ommon-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed. . . .

*Carey v. Piphus*, 435 U.S. 247, 266 (1978). The injury Kelly suffered was of a type this Court has held entitles her to an award of nominal damages. The State's argument to the contrary must be rejected.

The State's second contention is no more viable. While Governor Mofford may not have been amenable to a suit for damages in her official capacity, she was a

[7] Arizona had an interest in the monetary award because it has a statutory duty to indemnify state officials for acts in the course of State employment. A.R.S. § 41-621(A)(3).

proper individual defendant under the *Ex Parte Young*[8] doctrine, and the District Court expressly so found. (Pet. for Cert. 100a) As such, she was personally susceptible to liability for damages. Further, the State expressly waived its immunity with respect to Kelly's nominal damages claim. Further, the State did not appeal from the District Court's judgment awarding Kelly nominal damages. As a consequence, any argument premised on the impropriety of nominal damages has been waived. *See Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786, 789-90 (6th Cir.), *cert. denied*, 434 U.S. 852 (1977).

The State's final argument, that Kelly's nominal damages claim is only "incidental" and cannot support Article III standing, is based exclusively on a disingenuous interpretation of *Alejandrino v. Quezon*, 271 U.S. 528 (1926). *Alejandrino* does not stand for the proposition that if a damage claim is "incidental" to a declaratory relief claim, the damage claim cannot avoid mootness. Rather, it simply holds that a party cannot avoid mootness when the only potential claim remaining is not well pled and is indeterminate. *Id.* at 534-35; *see also Powell v. McCormack*, 395 U.S. 486, 498 (1969) (stating that *Alejandrino* does not stand for the proposition that damages are insufficient to prevent an issue from becoming moot). This Court, and virtually every other federal court, recognizes that the existence of claims for nominal damages obviates mootness. *See Lokey v. Richardson*, 600 F.2d 1265, 1266 (9th Cir. 1979), *cert. denied*, 449 U.S. 884 (1980); *see also Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 442 (1984) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.")

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[8] 209 U.S. 123 (1908).



## IV. VACATUR OF ANY OF THE UNDERLYING DECISIONS IS INAPROPRIATE

Both the State and AOE assert that, in the event of lack of standing or mootness, *all* lower court decisions should be vacated. (Pet. Brf. 47; AZ Brf. 34-35) This assertion both ignores the procedural history of this case and defies the rationale of *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994). Application of *U.S. Bancorp's* analysis to this case compels the conclusion that the "extraordinary remedy of vacatur"[9] is not justified in any regard.

Governor Mofford's refusal to appeal from the District Court judgment against her is of fundamental importance to any vacatur analysis. That judgment became final and effective as to Governor Mofford and her successors insofar as Kelly is concerned. As the Ninth Circuit noted in *Yniguez I*:

> [t]here is no dispute that the declaration that Article XXVIII is facially invalid binds Governor Mofford and her successors in any actions against Ms. Yniguez.

(J.A. 177) This final judgment, which was unappealed and became binding long before Kelly left state employment, is not properly subject to the equitable doctrine of vacatur.

A case or controversy nonetheless existed between Kelly and the State throughout the Ninth Circuit proceedings. By way of the Ninth Circuit's order regarding 28 U.S.C. § 2403(b), the State maintained a justiciable interest in the merits.[10] On November 7, 1995, the District

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[9] *U.S. Bancorp*, 115 S. Ct. at 392.

[10] Kelly has consistently argued that AOE had no standing to appeal the District Court's judgment. AOE's lack of standing however, does not require vacatur of the Ninth Circuit's

Court vindicated Kelly's right to nominal damages by entering judgment in her favor. (J.A. 211) Not only did the State expressly waive its immunity in connection with the award of nominal damages (Y.A. 28-32; Pet. for Cert. 59a), it did not appeal from that judgment. That judgment is binding and final insofar as the State is concerned. Moreover, the State neither petitioned this Court for a writ of certiorari nor joined in AOE's petition. This failure results in a binding and final judgment between the State and Kelly. *See Federated Dept. Stores, Inc. v. Martin*, 452 U.S. 394, 400 (1981) (holding that the doctrine of res judicata applies when "it is apparent that [a party has] made a calculated choice to forgo [its] appeal[ ]"). Instead, the State "decided to acquiesce" in the Ninth Circuit's ruling. (AZ. Brf. 26.) Thus, the record convincingly demonstrates both Governor Mofford's and the State's conscious determinations to eschew judicial review of the judgments against them. The State's current effort to collaterally attack these judgments through misuse of vacatur should not be countenanced.

This Court noted in *U.S. Bancorp.* that the equitable tradition of vacatur places the burden on a supplicant for that relief to demonstrate its right to invoke the doctrine, and that it is generally inapplicable where a party has failed to appeal:

> Respondent won below. It is petitioner's burden as the party seeking relief from the status quo of the appellate judgment, to demonstrate. . .

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opinion. Under 28 U.S.C. § 2403(b), the State had standing – independent of AOE – to pursue an appeal of the District Court's ruling on the merits. *See Maine v. Taylor*, 477 U.S. 131, 136 (1986); *see also Ruotolo v. Ruotolo*, 572 F.2d 336, 338-89 (1st Cir. 1978) (holding that the government may go forward with litigation in its own right under 28 U.S.C. § 2403(b) when it has an "independent source of authority permitting it to sue on behalf of itself").



> equitable entitlement to the extraordinary remedy of vacatur. Petitioner's voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case might have been.

115 S. Ct. at 392. This Court reasoned that judicial review, not vacatur, is the appropriate methodology to avoid the effect of adverse judgments:

> Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would – quite apart from any considerations of fairness to the parties – disturb the orderly operation of the federal judicial system.

*Id.*

Here, the State consciously elected not to appeal from the nominal damage judgment or petition for a writ of certiorari on the merits. For purposes of vacatur, the State's actions epitomize "the lack of equity of a litigant who has voluntarily abandoned review." *See id.* at 244. The lower court's decisions should not be disturbed.

## V. THE OVERBREADTH OF ARTICLE XXVIII.

This case does not involve the creation of new rights. Nor does this case involve the expansion of existing rights. Instead it confronts the question of how far a government may go in repressing settled First Amendment rights.

The plain language of Arizona's "English Only" amendment underscores the enormous breadth of its reach. It insists that "[t]his State and all political subdivisions of this State shall act in English *and in no other language.*" (Y.A. 2) Its prohibitions apply to communications by "all government officials and employees during the performance of government business." (Y.A. 1) It precludes elected and appointed officials from selecting the language they deem appropriate to perform their jobs. It restricts legislators, judges, and elected officials, as well as every clerical and administrative employee of the State. Indeed, on its face Article XXVIII even forbids the government from using Arizona's official motto, *Ditat Deus*[11] during the course of its business.

The First Amendment is the caretaker of free speech. It protects both the speaker's right to be heard and the recipient's right to receive a message. Article XXVIII spurns those rights. The lower courts properly struck it down.

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[11] Ditat Deus, which is displayed on the Arizona state seal, is Latin for "God Enriches." Among other things, it appears on state publications, proclamations, licenses, and letterhead.



## VI. STANDARD OF REVIEW.

### A. Article XXVIII Is A Prior Restraint On Speech Content – As Such, It Is Subject To Strict Scrutiny.

The government cannot promote speech it deems valuable and suppress speech it deems less valuable. The content of speech, therefore, enjoys special constitutional protection. *See, e.g., Near v. Minnesota, ex rel. Olson*, 283 U.S. 697, 707 (1931); *Lind v. Grimmer*, 30 F.3d 1115, 1119 (9th Cir. 1994); *see also 44 Liquormart v. Rhode Island*, 116 S. Ct. 1495, 1514 (1996) (stating that "speech restrictions cannot be treated as simply another means that the government may use to achieve its ends"). Speech restrictions singling out the content of a message are subject to strict scrutiny. Viewed under this most exacting standard, a content-based restraint will survive only if it is narrowly drawn and necessary to protect a compelling state interest. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

When a government bans the use of certain languages, it restricts the content of speech. *Asian American Bus. Group v. Pomona*, 716 F.Supp. 1328, 1330 (C.D. Cal. 1989) (holding that because "language used is an expression of national origin, culture and ethnicity, regulation of . . . language is a regulation of content"). The language a speaker chooses and the nuances that language contains are inherent elements of communication. (Y.A. 7; J.A. 81) Therefore, when a government selects the words it permits people to use to communicate ideas, it regulates content. *Aids Action Comm. v. Massachusetts Bay Transp. Authority*, 42 F.3d 1, 9 (1st Cir. 1994) (finding that a regulation that "limits the universe of words the speaker may select" is content-based).

Article XXVIII goes further still. It also acts as a prior restraint. It chills government employee speech on all levels, including speech that informs the public about the

political process, government wastefulness, and misconduct by public officials. These subjects lie near the core of the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964) ("[O]rder cannot be secured merely through fear of punishment for its infraction; [ ] it is hazardous to discourage thought, hope and imagination; [ ] repression breeds hate; [ ] hate menaces stable government; [and] the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. . . . ") Consequently, Article XXVIII is subject to the most critical analysis.

### B. At the Very Least, The Heightened Balancing Test Established in *United States v. National Treasury Employees Union* Applies to This Case.

Last year this Court articulated a test to evaluate non-content-based *ex ante* restrictions which merely deter (rather than ban) public employees' speech. In *United States v. National Treasury Employees Union* ("NTE"), this Court declared that prior restraints on speech create such sweeping impediments that they must be held to a higher standard than *post hoc* restrictions.[12] 115 S. Ct. 1003, 1013 (1995). When the government seeks *ex ante* regulation of employee speech, it shoulders a heavy burden. In such cases, courts must balance not only the interests of the employee in communicating freely, but also the interests of future employees and possible recipients of present and future communications:

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[12] The standard balancing test courts use to evaluate employee speech *post hoc* was established in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). The *Pickering* test weighs the interest of the employee in speaking on matters of public concern against the government's interest in promoting efficiency.



> the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interests of **both potential audiences and the vast group of present and future employees** in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the Government.

*Id.* at 1014 (emphasis added; citation omitted).

Even if Article XXVIII were not content-based, it nonetheless is an *ex ante* ban that chills public employees' speech. As a consequence, and at a minimum, the *NTE* test applies to this case. Under that test, AOE must establish that the State's interest in efficient operation outweighs the interests of both potential audiences as well as present and future government employees in present and future expression. *Id.* In light of the uncontroverted record, this is a burden AOE cannot meet.

## VII. ARTICLE XXVIII FRUSTRATES THE FIRST AMENDMENT RIGHTS OF LEGISLATORS, JUDGES, AND OTHER GOVERNMENT EMPLOYEES.

Elected officials are government employees. Because they are obligated to communicate with their constituents, legislators' "core speech" is given the widest latitude. *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966). A legislator expresses opinions and disseminates and receives information from constituents during the course of government employment. Any restriction on that expression and communication directly conflicts with the guarantees of the First Amendment. *Id.* Yet Article XXVIII limits a legislator's choice of words to those available in a single, sanctioned language. Judge Brunetti focused on this flaw in his concurrence to the Ninth Circuit opinion:

> Article XXVIII offends the First Amendment not merely because it attempts to regulate ordinary speech, but because it attempts to manipulate the political process by regulating the speech of elected officials. Freedom of speech is the foundation of our democratic process, and the language restrictions of Article XXVIII stifle informative inquiry and advocacy by elected officials. By restricting the free communication of ideas between elected officials and the people they serve, Article XXVIII threatens the very survival of our democratic society.

(Pet. for Cert. 62a-63a)

Article XXVIII interferes with legislators' abilities to communicate with their constituents. Arizona not only has a large Hispanic population, but a significant Native American population as well. Ironically, under Article XXVIII non-English-speaking citizens may be unable to freely communicate with elected representatives when those officials may have been elected, in part, because of their abilities to communicate with constituents in non-English languages.

Article XXVIII also restricts the language choices of judges. No matter what language best conveys judges' ideas, under Article XXVIII, they will be required to limit their vocabularies to those words which are acceptable. Article XXVIII forbids judges from using phrases like "per stirpes," "res ipsa loquitur," or, for that matter, "Kulturkampf".[13] There are few government activities more official than the orders and opinions judges issue. Under Article XXVIII, they must conform to, and suffer the communicative restrictions imposed by, the government's officially-sanctioned language standards. Article XXVIII does not pass constitutional muster.

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[13] *Romer v. Evans*, 134 L. Ed. 2d 855, 868 (1996) (Scalia J., dissenting).



## VIII. THE GOVERNMENT'S RIGHT TO COMMUNICATE IN A CHOSEN LANGUAGE MUST BE BALANCED AGAINST THE RIGHTS OF ITS EMPLOYEES AND THE RECIPIENTS OF THE COMMUNICATION.

### A. The Government Does Not Have An Unfettered Right to Script the Speech of its Employees.

While it is true that the government "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted" by recipients of public funds, Article XXVIII is an inappropriate vehicle for ensuring a clear and undistorted government message. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2519 (1995). The record below establishes that Kelly spoke Spanish to Spanish-speaking citizens, English to English-speaking citizens, and a combination of the two languages to bilingual citizens. (Y.A. 5) Kelly's use of Spanish ensured that the recipients of the government's message understood the government's communication. In many cases, Article XXVIII's English-only mandate would result in a garbled-message to a non-English speaking recipient.[14] Article XXVIII would only increase

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[14] Kelly has never argued that citizens (or State employees) may compel, or prohibit, the state from communicating in particular language. On the contrary, she simply argues that State employees should not be precluded from communicating with non-English-speaking citizens if the employees are fully capable of accurately conveying the State's message at no additional cost or inconvenience. *See* Scott H. Angstreich, Note, *Speaking in Tongues: Whose Rights at Stake? Yniguez v. Arizonans for Official English*, 19 Harv. J. L. & Pub. Pol'y 634, 640-41 (1996).

confusion. It is not a "legitimate" means for ensuring the clarity of the State's message. (Y.A. 10)[15]

In *Rust v. Sullivan*, this Court recognized that the government has broad – though not unlimited – power to regulate the government-subsidized speech of private parties. 500 U.S. 173, 193 (1991). AOE, however, would stretch the *Rust* holding much farther. AOE claims that *Rust* empowers the government to speak in any manner it chooses, no matter how garbled or incomprehensible the message becomes. But *Rust* is narrower. In that case, this Court focused on government-subsidized speech by private parties carrying out government programs. Among other things, this Court noted that the speech restrictions at issue were acceptable because the affected subsidy recipient was not compelled to operate under the government program and citizens could receive the restricted information elsewhere. 500 U.S. at 199 n. 5. This case is distinct from *Rust*. It does not involve government subsidies of private programs. To the contrary, it directly involves both State government and State government programs. In this case, recipients of government services have nowhere to turn for government information except to people like Kelly. This case does not involve the alternatives and choices that were so important to this Court's analysis in *Rust*.

AOE also distorts the holding in *Rosenberger*. Like *Rust*, *Rosenberger* involved government-subsidized speech. In determining that the governmental restriction at issue violated the First Amendment, this Court stated that "[t]he government must abstain from regulating

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[15] It is worth noting the AOE's "clarity of governmental messages" argument is new. AOE urged adoption of Article XXVIII to avoid "tension and division" and to "encourage non-English speakers to familiarize themselves with the language." (J.A. 28-29)



speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." 115 S. Ct. at 2516. Here, the record demonstrates that Article XXVIII was intended to impact on minority group members. It is squarely contrary to the First Amendment.

Article XXVIII goes far beyond restricting only government speech or government messages. It restricts the entire vocabularies of those who do not speak the language of the majority. It greatly transcends the restrictions at issue in *Rust* and *Rosenberger*. The Ninth Circuit correctly determined that it is constitutionally overbroad.

### B. Public Employees Have First Amendment Rights During the Course of Their Employment.

This Court has repeatedly held that government employees do not forfeit their First Amendment rights by virtue of their employment. *E.g., Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979). A public employee's public and private communications are not *per se* exempt from First Amendment protection. *See id.* (stating that "a public employee [does not] forfeit[ ] his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly"); *Koch v. City of Hutchinson*, 847 F.2d 1436, 1442 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988) (holding that communications made in the course of a public employee's duties are not *per se* exempt from constitutional protection).

Article XXVIII unambiguously restricts speech that involves public employees' private and non-private communications in the course of their duties. Under varying circumstances, such speech achieves First Amendment protection.

Government employees are afforded First Amendment protections when they speak about non-private issues during the scope of their duties. *Johnson v. Multnomah County*, 48 F.3d 420 (9th Cir. 1995). In *Johnson*, a county government employee was fired for "blowing the whistle" on her supervisors. The Ninth Circuit determined that the plaintiff's allegations of misconduct and misappropriation within her department involved important public concerns that warrant First Amendment protection. *Id.* at 425. Similarly, in *Roth v. Veteran's Admin.*, the Ninth Circuit determined that a whistle-blower's criticisms, which were communicated to his superiors and administrative personnel, were protected because the employee was hired, in part, for the purpose of acting as a troubleshooter. 856 F.2d 1401, 1406 (9th Cir. 1988). In *Rookard v. Health and Hosp. Corp.*, the Second Circuit likewise determined that a nursing director for a municipal hospital had a First Amendment right to speak out on issues related to hospital procedure because "as Director of Nursing, **it was her duty to do as she did**." 710 F.2d 41, 46 (2d Cir. 1983) (emphasis added). Other cases have come to similar conclusions. *See Considine v. Board of County Comm'rs*, 910 F.2d 695, 699 (10th Cir. 1990) (determining that an employee's speech at a work meeting was protected under a *Pickering* analysis); *Piesco v. Koch*, 12 F.3d 332, 342 (2d Cir. 1993) (applying a balancing test to determine if an employee's speech during a work meeting with members of a legislative committee was protected); *Kingsville Ind. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (holding that a school teacher's course work on African Americans in American history was protected by the First Amendment); *Williams v. Kentucky*, 24 F.3d 1526, 1535 (6th Cir. 1994) (determining that a supervisor's routine evaluation of a subordinate was protected speech under the *Pickering* test).

Of course, the First Amendment rights accorded to public employees' duty-related speech, whether private



or non-private, are not unlimited. By the same token, however, because the First Amendment protects certain non-private speech in the course of public employment, the government's right to restrict that speech is also limited. Article XXVIII's fatal flaw is its wholesale *ex ante* ban on all non-English employee speech. It affects non-private communications between an employee and her supervisor, an employee and co-workers, and an employee and members of the public. It unlawfully affects both protected and unprotected speech. Article XXVIII is therefore unconstitutionally overbroad. *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

### C. Article XXVIII Violates Public Employees' Rights To Make Statements Upon Matters Of Public Concern.

This Court has held that the government may not dismiss a government employee or deny him a government benefit due to the exercise of speech where the employee's speech addresses a matter of public concern. *Pickering v. Board of Educ.*, 391 U.S. 563, 572-74 (1983). Certain subjects are inherently of public concern. For example, in *Givhan*, this Court held that when a public school teacher privately commented to the school principal that the district adopted racially discriminatory policies, her expressions warranted First Amendment protection. 439 U.S. at 415-16; *see also Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983) (characterizing Givhan's allegation regarding racial discrimination as "a matter inherently of public concern"). Courts have also identified the misuse of public funds, wastefulness, and inefficiency in managing government as matters of public concern. *Hamer v. Brown*, 831 F.2d 1398, 1402 (8th Cir. 1987). Similarly, in *Czurlanis v. Albanese*, the Third Circuit held that a county employee had spoken on matters of public concern when he challenged the practices of the Division of

Motor Vehicles and county government, which he considered "inefficient, wasteful, and possibly fraudulent, and in some cases, made suggestions for correcting the problems." 721 F.2d 98, 104 (3d Cir. 1983).

Under Article XXVIII, a government officer or employee may be terminated for speaking a non-English language while performing government tasks or while commenting about any of the matters identified as inherently dealing with public concern. The undisputed facts establish that Kelly and other State employees used both English and non-English languages to convey information about matters of public and private concern. (Y.A. 6) Kelly, in particular, used a non-English language in conducting investigations and rendering the state's final determination to admit or deny monetary claims against the State by citizens whose principal or only language was not English. (Y.A. 6) Furthermore, she used non-English languages to interview people who made employment discrimination allegations against the State. (Y.A. 6) The claims Kelly processed, and the interviews she conducted involved allegations of abuse, inefficiency, discrimination, and incompetence. (J.A. 45-46) Such issues are of "vital interest" to the citizenry and, as a result, are constitutionally-protected. *See Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993). Article XXVIII improperly prohibits these communications in their entirety.

### E. Article XXVIII Fails to Pass Any Balancing Test.

Any balancing test requires courts to analyze the State's interest in promoting efficiency. Kelly and the State submitted certain Stipulated Facts to the trial court regarding this very issue. The State agreed that Kelly's use of Spanish contributes both to the "efficient operation" and "efficient administration of the State." (Y.A. 6)



In addition, in its responses to Kelly's requests for admission, the State admitted that it has "no legitimate purpose in restricting" her from speaking Spanish while performing government business. (Y.A. 10)

An intervenor to a case takes the case as he finds it. *See United States v. California Coop. Canneries*, 279 U.S. 553, 556 (1929). Simply put, "[an intervenor] cannot change the issues framed between the original parties, and must join subject to the proceedings that have occurred prior to his intervention; he cannot unring the bell." *Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 153 (S.D. Cal. 1954). Bound by the record, he cannot raise questions of fact on appeal that were conclusively resolved through a stipulation between the original parties. *Shender v. Zoning Bd. of Adjustment*, 131 A.2d 90, 91 (Pa. 1957) (determining that an intervenor was bound by a stipulation of facts because "he takes the suit as he finds it"); *see also Lane v. Ferguson*, 156 P.2d 236, 239-40 (Ariz. 1945) (holding that intervenors "should not and cannot be heard to complain that the parties in a going lawsuit" have stipulated to certain treatment in a case).

In this case, AOE was fully aware of the parties' stipulated facts and the State's responses to discovery. In fact, at the District Court hearing on AOE's Motion to Intervene, AOE's counsel stated: "We contemplate taking no further testimony whatsoever that would have any effect on anything that's gone before. We live with what's before this Court thus far." (J.A. 130) AOE may not now reject the record of this case. It is bound by the record established by the original parties.

Even without the State's admission that Kelly's use of Spanish contributed to governmental efficiency, the record is devoid of any evidence that non-English speech by State employees hinders the efficient operation of government in any manner. AOE has no interest whatsoever, much less a compelling interest, to place on the

scales to counter the weight of the constitutionally-protected interests of State employees and their potential audiences. As a result, Article XXVIII fails any balancing test.

### 1. AOE's Argument That the Government Has Substantial Interests in Protecting Itself from Non-English Languages Is Not Supported By The Record.

AOE argues that "government has substantial interests in protecting itself from the divisive effects of multilingualism." (Pet. Brf. 36) It claims that Article XXVIII fosters unity, encourages immigrants to learn English, protects English from erosion, and shields Arizona from linguistic discord. (J.A. 26-32; Pet. Brf. 17) None of these reasons is supported by fact or by the record of this case.

#### a. Article XXVIII Will Not Achieve Unity but Instead Will Isolate Language Minority Groups.

When a government declares that a single language is officially endorsed,[16] the result is anything but unifying. In reality, certain non-English-speaking groups become disfavored within society. As one scholar has explained:

> [o]ne's language is intimately associated with the individual; new languages are difficult to learn; and language is a particularly easy tool to use in political control. Therefore, when language policies establish boundaries between people and government the effects are likely to

[16] Article XXVIII, in fact, is much more than a declaration that English is the official language of Arizona. It requires the government and its employees – at all levels – to act in English "and in no other language."



> be quite significant: alienation, distancing, and political impotence. . . . Thus, language can be used not only to establish real boundaries but to communicate **attitudes** and **feelings** of government toward people as well.

William M. O'Barr, *Boundaries, Strategies, and Power Relations: Political Anthropology and Language* in *Language and Politics*, 414 (William M. O'Barr & Jean F. O'Barr ed. 1976) (emphasis in original). Even a mere symbolic enactment creates inequality between groups that are given – or not given – official sanction. When the government designates certain traits as "official," all persons lacking the official traits are relegated to second-class citizenship. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 368 (1992). While "official English laws" may indeed unify members of the English-speaking "inside," they disenfranchise citizens who are language "outsiders." The Ninth Circuit recognized this fact in its opinion when it stated that "the state cannot achieve unity by prescribing orthodoxy." (Pet. for Cert. 54a); *see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943) (stating that "[n]ational unity [is] an end which officials may foster by persuasion and example" but not by constitutional compulsion); *Meyer v. Nebraska*, 262 U.S. 390, 392 (1923) (finding that forced Americanization violates the American tradition of liberty and tolerance).

Recently, this Court recognized the importance of protecting minority groups from exclusion by the majority:

> [t]hese [constitutional] protections [are] taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors

that constitute ordinary civic life in a free society.

*Romer v. Evans*, 116 S. Ct. 1620 (1996). Polarizing language groups does not achieve unity[17] and it is unconstitutional on many levels. Article XXVIII, therefore, fails to achieve its stated goal.

**b. Article XXVIII Is Not An Appropriate Vehicle For Encouraging Citizens To Learn English.**

Ninety-eight percent of Hispanic parents believe it is "essential for children to read and write English perfectly." J. Crawford, *Bilingual Education: History, Politics, Theory and Practice* 60 (1989). Only 94 percent of Anglo parents feel the same. *Id.* Empirical evidence confirms that Spanish-speaking families are eager to learn English. Over three generations, Spanish-speaking families become English-speaking families. The first generation is primarily monolingual, the second generation is bilingual, and in the third generation English is the preferred language. McCarthy & Valdez, *Current and Future Effects of Mexican Immigration in California* 65 (1989). Monolingual Spanish-speakers continue to exist, not because immigrants refuse to learn English, but because continuing immigration ensures that there are always people in transition. C. Veltman, *The Future of the Spanish Language in the United States* 45 (1988).

Restricting non-English speakers' access to their government is not an appropriate method for encouraging them to learn English. Such a patronizing action is unwarranted and unlawful. *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996) (holding that the

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[17] *See* Leila S. Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 Wash. L. Rev. 285, 357-68 (1996).



First Amendment directs courts to be "especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good"). While the Ninth Circuit recognized the importance of encouraging a common language, it concluded "that Article XXVIII is [not] in any way a fair, effective, or appropriate means of promoting those interests." (Pet. for Cert. 54a)

**c. English Is Not Threatened by the Government's Use of Non-English Languages.**

AOE argues that the English language may be eroded by government's use of non-English languages. (Pet. Brf. 36-37; J.A. 26) Article XXVIII, it claims, will protect English from the threat of foreign tongues. AOE's stated concerns, however, are ill founded. There is no serious movement to make any non-English language the official language of Arizona or the United States. A. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, Harv. C. R.-C. L. L.Rev. 293, 321 (1989). In fact, quite the opposite is true. Non-English-speaking immigrants are shifting to English at an historically rapid pace. *Id.* at 322. These immigrant groups recognize that English is the language of commerce and economic opportunity. They understand that these benefits are not available to those who do not speak English. *Id.* at 321. Article XXVIII is unnecessary. Even assuming that its motivations are pure, it is designed to protect English from an enemy that simply does not exist.

**d. Article XXVIII Will Not Protect Arizona from Discord.**

To support the notion that English must be declared the official language, AOE and amici state that multilingual countries become divided over language. (Pet.

Brf. 36.) These countries' problems, however, may in fact stem from official language movements.

Canada is a prime example. In 1969, both English and French were declared the official languages of Canada. Five years later, in an attempt to control what it considered a threat from the English-speaking minority, a French-speaking provincial majority declared French the exclusive language of Quebec.[18] Maldoof, *Comment: A Canadian Perspective*, 60 Int'l J. Soc. Lang. 105, 110 (1986). The elevation of French led to more restrictive language laws and more divisiveness among the language groups in Quebec. *Id.* Canada's experience with official language movements suggests that divisiveness and discord are *more* likely when a single language is declared official. *Id.* In short, Article XXVIII may lead to the very divisiveness it professes to avoid.

## IX. ARTICLE XXVIII UNCONSTITUTIONALLY IMPAIRS THE FIRST AMENDMENT RIGHTS OF RECIPIENTS.

The First Amendment right to communicate encompasses the right to communicate effectively. *Reeves v. McConn*, 631 F.2d 377, 382 (5th Cir. 1980). Consequently, "[t]he mere existence of an alternative means of expression . . . cannot by itself justify a restraint on some particular means that the speaker finds more effective." *Id.* Article XXVIII violates the First Amendment because it effectively bars certain intended recipients of communication from receiving the messages the speaker intends to

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[18] The Quebec law "was adopted in response to growing nationalist sentiment and a feeling that the French-speaking majority was threatened by the English-speaking minority and the strength of the English language and culture of North America." Maldoof, *Comment: A Canadian Perspective*, 60 Int'l J. Soc. Lang. 105, 111 (1986).



convey. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (holding that "where a speaker exists . . . [First Amendment] protection is afforded . . . to the communication, to its source and to its recipient both").

Article XXVIII precludes non-English speakers from exchanging any information with their government even if the government has the ability – through employees like Kelly – to receive and disseminate information at no additional cost to the government. The public's right to receive communication involving ideas and information has long been recognized to be a necessary corollary to enumerated First Amendment freedoms, including the right to assemble and petition for redress of grievances. As Justice Brennan observed in *Board of Education v. Pico*, taking counsel from James Madison, "[t]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom" 457 U.S. 853, 867 (1982) (emphasis in original); *see also Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (stating that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes . . . the right to receive . . . .") Article XXVIII's blanket prohibition violates the rights of non-English-speaking citizens who seek to communicate with their government. *Cf. Romer v. Evans*, 116 S. Ct. 1620 (1996) (stating that the "government and each of its parts [must] remain open on impartial terms to all who seek its assistance.") The Ninth Circuit correctly determined that it is unconstitutional.

## X. IN ADDITION TO ITS FIRST AMENDMENT INFIRMITIES, ARTICLE XXVIII VIOLATES THE FOURTEENTH AMENDMENT.

In addition to her injuries under the First Amendment, Kelly's complaint alleged that Article XXVIII violates the Fourteenth Amendment. Although the lower courts did not directly address the Fourteenth Amendment, the courts' discussions of facts and law are relevant to a Fourteenth Amendment analysis.[19] This Court should undertake such an analysis if it reaches the merits of this case.

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[19] Substantial facts were adduced at the trial court level establishing, *inter alia*, the disparate impact of Article XXVIII on ethnic minorities. Neither the Ninth Circuit nor the District Court reached the equal protection issues Kelly raised. In his dissent from the Ninth Circuit opinion, however, Judge Kozinski recognized that additional proper grounds may exist for invalidating Article XXVIII:

> [t]his is not to say that Arizona's English-only policy is constitutional. As the majority and the concurrence point out, Article XXVIII makes it harder for many Arizonans to receive government services. A successful challenge might be raised by those whose ability to deal with their government is thereby impaired. Nor is the First Amendment the only basis on which the policy might be attacked; Yniguez also charges that the English-only policy violates equal protection and conflicts with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. No court has yet directly considered these arguments, which go more directly to the heart of the dispute.

(Pet. for Cert. 92a)



### A. By Depriving Arizona Citizens of Their Pre-existing Communication Rights, Article XXVIII Violates the Fourteenth Amendment's Guarantee of Equal Protection.

Article XXVIII caused a major change in relations between Arizona citizens and their government. Prior to its adoption, Arizona government employees and officials were free to communicate with citizens in any language that the employees and citizens both understood. Although the State did not have an employment policy mandating that employees speak multiple languages, it employed workers who were generally representative of the Arizona populace and who were multi-lingual. In addition to English, some government employees spoke Native American languages while others spoke Spanish or other tongues. As a result, prior to Article XXVIII, citizens with limited or non-existent English language skills usually could find a government employee with whom they could effectively communicate.

Arizona's adoption of Article XXVIII severely limited the discourse between its citizens and their government. In fact, Article XXVIII targeted a minority of the Arizona population who lacked English language skills and prohibited them from communicating with their government, a government that had the ability to communicate with them at no cost or burden. The State is unable to articulate a reason why a State employee who speaks Spanish and English is free to communicate in English with English-speaking citizens yet is forbidden to communicate in Spanish with Spanish-speaking citizens. Indeed, Kelly's use of a non-English language fostered State efficiency and resulted in an exchange of information of interest to both the citizenry and the State itself. (J.A. 46)

Article XXVIII imposes a "broad and undifferentiated disability on a single [ ] group" of citizens, non-English

speakers. *See Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996). Its "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable with anything but animus toward the class that it affects." *Id.* Article XXVIII's effect is also contrary to "the principle that [the] government and each of its parts remain open on impartial terms to all who seek its assistance. 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' " *Id.* at 1628 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

Like the illegal amendment enacted by referendum in *Romer*, Article XXVIII is "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. '[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . . ' " *Id.* at 1629 (quoting *The Civil Rights Cases*, 109 U.S. 3, 24 (1883)). Because the law is "obviously intended chiefly to affect [the non-English speaking class] as distinguished from the rest of the community, [it] is a denial to them of the equal protection of the laws." *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528 (1926).

### B. Article XXVIII Also Infringes on the Constitutional Notion of a Republican Form of Representative Government.

In addition to its other defects, Article XXVIII deprives Arizona citizens access to their government. This limitation on citizens is incompatible with the concept of a republican form of government.[20] Simply stated, Article XXVIII prohibits a subclass of society from communicating with their representatives and elected officials. This unconstitutionally inhibits citizen participation in the political process. *See Reynolds v. Sims*, 377 U.S. 533,

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[20] U.S. Const. Art. IV, § 4.



565 (1964) (declaring a state districting system unconstitutional under the Equal Protection Clause and stating that "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies"). Article XXVIII acts to deprive a small class of citizens of the full enjoyment of the Constitution's guarantee of participation in State government. More specifically, it deprives the subclass of a right which is enjoyed without restriction by all other citizens. It must be stricken.

## CONCLUSION

Based on the foregoing, this Court is respectfully urged to vacate its order granting certiorari and dismiss the Petition for Writ of Certiorari. Alternatively, this Court is respectfully urged to affirm the *en banc* decision of the United States Court of Appeals for the Ninth Circuit. In addition, the Court is requested to award Respondent Maria-Kelly F. Yniguez her fees and costs and such other relief as the Court deems just and proper.

Respectfully submitted,

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July 26, 1996

# APPENDIX

## ARTICLE XXVIII ENGLISH AS THE OFFICIAL LANGUAGE

1. *English as the Official Language; Applicability.*

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3)(a) This Article applies to:

(i) the legislative, executive and judicial branches of government

(ii) all political subdivisions, departments, agencies, organizations, and instrumentatalities of this State, including local governments and municipalities,

(iii) all statutes, ordinances, rules, orders, programs and policies.

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

2. *Requiring This State to Preserve, Protect and Enhance English.*

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve,

protect and enhance the role of the English language as the official language of the State of Arizona.

3. *Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.*

Section 3. (1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as a part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.



4. *Enforcement: Standing.*

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

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Attorneys for the Plaintiff

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

| | |
|---|---|
| MARIA-KELLY F. YNIGUEZ,<br>Plaintiff,<br><br>vs.<br><br>ROSE MOFFORD, individually and as Governor of the State of Arizona, ROBERT K. CORBIN, individually and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona,<br><br>Defendants. | **CIV NO. 88-1854 PHX PGR**<br><br>**PLAINTIFF'S AND DEFENDANTS, STATEMENT OF STIPULATED FACTS** |

The parties stipulate that in addition to the pleadings, other evidence and documents on file, the following facts are deemed uncontested and may be used by this Court as evidence subject only to relevancy objections:

* * *

3. Kelly is a State Service employee employed by the State of Arizona in the Risk Management Division of



the Department of Administration. She is an Insurance Claims Manager and, among other duties, manages medical malpractice claims asserted against the State of Arizona or physicians for whom the State provides insurance on a self-insurance basis. She has been so employed since 1984.

* * *

8. Kelly is bilingual, fluent and literate in both the Spanish and English languages. Spanish and English are Kelly's two natural languages. Kelly thinks in both languages and in the course of otherwise unimpeded conversation, naturally alternates between the two languages to appropriately express herself to persons who are able to understand her. She considers the Spanish language to be a part of her cultural heritage.

* * *

11. If Kelly issues an order denying, settling or approving a claim, she is governed by Article XXVIII and must act only in English.

* * *

13. In the prior course of acting for the State of Arizona as a State Service employee, Kelly spoke the English language to persons who speak only English, the Spanish language to persons who speak only Spanish, and a combination of the English and Spanish languages to persons who were able to communicate in both languages. Some of the persons with whom she communicated in a combination of the Spanish and English languages were persons whose command of the English

language was not sufficiently well-developed to understand all of the English language expressions and ideas which Kelly desired to communicate. Some of the persons with whom she communicates in the Spanish language also could communicate in the English language, but Kelly communicates in the Spanish language because the emotive ideas and feelings which she desired to express were, in her judgment and the exercise of her liberties, best and most clearly expressed in the Spanish language. In addition, Kelly communicated in the Spanish language to express otherwise inexpressible concepts and ideas.

14. In the course of acting for the State of Arizona as a State Service employee, Kelly has drafted legal settlement documents in both the English and Spanish languages to enable persons who were unable to understand the English language to comprehend the legal import of the document they were signing. She also communicated in the Spanish language pertaining to matters of public interest and importance. Kelly has previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public and private concern.

15. Maria-Kelly F. Yniguez' use of a language other than English in the course of her performing government business contributes to the efficient operation of the State and to the efficient administration of the State.

16. The efficient operation of the State is enhanced by permitting State service employees to communicate with citizens of the State in languages other than English where the citizens are not proficient in English.



17. The efficient administration of the state is enhanced by permitting State service employees to communicate with citizens of the state in languages other than English where the citizens are not proficient in English.

* * *

20. The State of Arizona has adopted specific standards governing the conduct of State Service employees, violation of which "is cause for discipline or dismissal of a State Service employee." Some of these standards are embodied in Arizona's Administrative Rules and Regulations, including A.C.R.R. R2-5-501.

21. Employees of the State of Arizona who fail to obey the laws of the State of Arizona may be subjected to discipline or dismissal.

22. The regulations of the State of Arizona which require State service employees to comply with State laws and regulations require compliance with the Constitution of the State of Arizona as a part of the laws of the State.

23. The Director of the Department of Administration, Catherine Eden, is responsible, directly or indirectly through persons appointed by the Director, for the enforcement of personnel rules of the State of Arizona.

24. The Department of Administration has the power to impose employment sanctions on Kelly if, in the Department's opinion, she has violated a law, including Article XXVIII.

25. Maria-Kelly F. Yniguez is required by her employer to obey the Constitution and laws of the State of Arizona.

26. Maria-Kelly F. Yniguez is required by her employer to bear true faith and allegiance to the Constitution and laws of the State of Arizona.

27. Under its personnel rules, the State of Arizona has disciplined employees who failed to comply with the laws of the State of Arizona.

28. Under its personnel rules, the State of Arizona has dismissed employees for their failure to comply with the laws of the State of Arizona.

29. The State of Arizona intends, under its personnel rules, to continue to discipline employees who fail to comply with the laws of the State of Arizona.

30. The State of Arizona intends, under its personnel rules, to continue to dismiss employees who fail to comply with the laws of the State of the State of Arizona.

* * *

36. Governor Mofford expects State service employees to comply with Article XXVIII.

* * *

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

| | |
|---|---|
| MARIA-KELLY F. YNIGUEZ, Plaintiff, vs. ROSE MOFFORD, individually and as Governor of the State of Arizona, ROBERT K. CORBIN, individually and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona, Defendants. | **CIV NO. 88-1854 PHX PGR**<br>**ANSWERS TO PLAINTIFF'S FIRST SET OF NON-UNIFORM INTERROGATORIES AND REQUESTS FOR ADMISSION** |

To: Defendants Rose Mofford, Robert K. Corbin and Catherine Eden and their attorney, Robert K. Corbin, Attorney General and Anthony Ching, Solicitor General

Pursuant to Rules 26, 33 and 36, *Fed.R.Civ.P.*, Plaintiff requests that Defendants answer in writing and under oath, within thirty (30) days from the date of service hereof, or within such other time as may be ordered by

the Court, the following non-uniform interrogatories and requests for admissions:

* * *

**REQUEST FOR ADMISSION NO. 18:** Admit that the State of Arizona has no legitimate purpose in restricting Maria-Kelly F. Yniguez from using the Spanish language in the course of her performing government business.

Admit.

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**CIVIL MINUTES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA**

**DATE:** December 21 1988

**PLACE: Phoenix, Arizona Judge Nr:** 7017

**Deputy Clerk:** Meredith Ingle

**Reporter:** Jean Moll

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**CIV-88-1854 PHX PGR**
Maria-Kelly F. Yniguez **vs.** State of Arizona et al

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**(Plaintiff)** **(Defendant)**

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**DOCKET NUMBER** **/ / Contd on reverse**

**MATTER ON FOR HEARING**

6 Deft State of Arizona's motion to dismiss for lack of jurisdiction

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**APPEARANCES** **/ / Contd on reverse**

Robert James Pohlman and Stephen G. Montoya for pltf

Anthony B. Ching for deft State of Arizona

---

**MINUTES** **/ / Contd on reverse**

Deft's objection to the filing of supplemental response and motion to strike: IT IS ORDERED permitting the

filing of pltf's supplemental response and denying the State's motion to strike and permitting limited argument on the Article III case in controversy insofar as it applies to the 11th Amendment objections.

Deft State of Arizona's motion to dismiss for lack of jurisdiction (6): The Court finds the complaint on its face withstands the motion to dismiss except as to the nominal defendant, State of Arizona. IT IS ORDERED granting the motion as to the State of Arizona.

The Court emphasizes this is a preliminary ruling by this Court. The issue will appear again under the briefing schedule on the subsequent motions.

(Counsel did not file an original motion for leave to file a supplemental response; this was done on oral motion at the hearing.)

/ / **Under Advisement** / / **Notice to Counsel**
/ / **Vacated** **Contd to:** _____

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DOCKETED BY:

/s/ Shirley Dorfman
Deputy Clerk

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

| | | |
|---|---|---|
| MARIA KELLY F. YNIGUEZ, | ) | Case No. CIV 88-1854-PHX-PGR |
| Plaintiff, | ) | Phoenix, Arizona |
| vs. | ) | Monday, February 13, 1989 |
| STATE OF ARIZONA, et al., | ) | Plaintiff's Motion for Preliminary Injunction and Order to Show Cause. |
| Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[p. 58, ll. 8-25] Yniguez – Direct

Q Have you personally taken any action as a result of Proposition 106?

A Yes. I don't speak Spanish in the work place.

Q And why is that?

A I don't speak Spanish in the performance of my job.

Q And why is that?

A Because I fear that I would be – it would be contrary to the amendment. I fear that someone could bring a lawsuit against me.

Q Have you had any indication that anyone in the general public is disconcerted with your action?

A Oh, definitely, I've got a few letters I could show you.

Q Have you had occasion to be involved with the disciplinary process at the State of Arizona?

A Yes, I have.

Q In what way?

A I had an employee that worked for me.



[p. 59, ll. 1-25] Q What was the contact that you had with the disciplinary process?

A In essence, we had some problems with the following of certain rules and regulations, and ultimately, that was resolved with a resignation.

Q Do you have any fear that you may undergo employment sanctions if you speak Spanish in the work place?

A Yes.

Q What's that based on?

A That's based on the fact that if I am charged with the – by the loyalty oath, and the rules of the Department of Administration that I should not, I could be disciplined or terminated for breaking any law, constitutional or statute, any state law, and discipline or dismissal is something that is possible.

Q Kelly, since the time that Proposition 106 was passed, and it was enacted as Article 28, has anyone told you that you should continue business as usual and speak Spanish?

A No.

Q Do you feel you can?

A No.

Q Why not?

A I feel I can't because I would be breaking the law as it now exists, and I would be setting myself up for a possible lawsuit and possible disciplinary action.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | |
|---|---|
| MARIA-KELLY F. YNIGUEZ, et al., Plaintiff, | No. CIV-88-1854-PHX-PGR |
| STATE OF ARIZONA, et al., Defendant. | Phoenix, Arizona<br>April 27, 1989<br>9:33 A.M. |

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
DEFENDANTS' MOTION TO DISMISS

APPEARANCES:

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Court Reporter:
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Phoenix, Arizona 85025
(602) 253-0707



Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

(p. 4, ll. 9-24) MR. CHING: Okay. In regard to number two, number two was necessitated because in the cross-examination of Ms. Yniguez the last time, at Page 67 and 68 of the transcript, Miss Yniguez testified that the settlement releases in the files concerning those claims that she worked on had releases in Spanish only, and that there was no English version of it. The question by me was:

"QUESTION: Okay. And is there also an English version of it on file?

"Answer: No."

What happened after that is that Miss Yniquez has had the opportunity to look at files and refresh her memory and discovered that that statement was incorrect.

THE COURT: Very well. Stipulation is accepted. (MARIA-KELLY F. YNIGUEZ, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN)

* * *

(p. 11, ll. 16-17) REDIRECT EXAMINATION

BY MR. POHLMAN:

* * *

(p. 12, ll. 7-22) Q. And the communication of the governmental act of settling the claim is communicated between claimant in what manner?

A. It can be communicated verbally, in whatever language the claimant understands.

Q. Can – how about the way of document?

A. I can also communicate it by letter. I can communicate it verbally.

Q. The files that Mr. Ching had you look at after the last hearing, was there a file in which there was a release in Spanish that was signed?

A. Yes. There was one file in which the release, the signed document was in Spanish. I did provide a translation of that document and placed it in the file so that anyone that had to look at the file for whatever reason and was not able to read the Spanish version could know what was contained within. The signed document was in Spanish.

* * *

(p. 15, ll. 7-17) MR. CHING: . . . The fact is that the witness gave us three files, and in one of which there is a Spanish version which is not - which is signed and an English version unsigned, but it's there. But in the other two files they were signed versions as to both languages.

THE COURT: I think that's what the Court understands from the testimony and from the stipulation, the only difference being that as I understand the plaintiff's testimony, she prepared the English translation of the Spanish settlement document and placed it in the file so that there would clearly be an English translation.

* * *

---



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James F. Henderson – 000454

**Attorneys for** Intervenors/Appellants Robert D. Park; Arizonans for Official English

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| MARIA-KELLY F. YNIGUEZ, JAIME P. GUTIERREZ, Plaintiffs, | ) | No. 90-15546 D.C. No. CV-88-1854-PGR |
| v. | ) | MOTION TO RECALL MANDATE |
| STATE OF ARIZONA, Defendant/Appellee. | ) | |
| ROBERT D. PARKS; ARIZONANS FOR OFFICIAL ENGLISH, Applicants in Intervention/ Appellants. | ) | |

MARIA-KELLY F. YNIGUEZ; JAIME P. GUTIERREZ,

Plaintiffs-Appellees.

v.

ROSE MOFFORD, individually and as Governor of the State of Arizona; ROBERT CORBIN, individually and as Attorney General of the State of Arizona,

Defendants-Appellants.

No. 90-15581

D.C. No. CV-88-1854-PGR

ROBERT D. PARKS; ARIZONANS FOR OFFICIAL ENGLISH,

Applicants in Intervention-Appellees.

Intervenors/appellants Robert D. Park and Arizonans for Official English move the Court for an Order recalling the Mandate issued herein on August 14, 1991. Recall is sought on the ground it was erroneously issued, contrary to the court's decision which specifically stated. "We shall retain jurisdiction over the appeal of the district court's decision on the merits," as more particularly shown in the attached Memorandum of Points and Authorities which by reference is incorporated herein.



Dated this 18th day of September, 1991.

GUST, ROSENFELD & HENDERSON

By _____
James F. Henderson
Attorneys for
Intervenors/Appellants
Robert D. Park and
Arizonans for Official
English

**MEMORANDUM OF POINTS AND AUTHORITIES**

This matter was argued and submitted December 14, 1990.

The Court's Opinion was filed on July 19, 1991. It reversed the District Court's denial of the intervention motion of Arizonans for Official English and Robert D. Park. It also permitted the Arizona Attorney General to make argument as to the constitutionality of Article XXVIII to the Constitution of the State of Arizona pursuant to 28 U.S.C. § 2403(b).

The Court's Opinion concluded with the statement:

> We shall retain jurisdiction over the appeal of the district court's decision on the merits.

On July 31, 1991, counsel for intervenors/appellants addressed a letter to the Clerk of the Court in reference to that statement. It was sent to identify the specific procedures to be followed in view of the Court's retention of jurisdiction. No response has been received to date (see Exhibit 1 hereto).

Counsel for intervenors/appellants relied upon the Court's specific direction that it would retain jurisdiction and have awaited further direction as to scheduling and briefing.

Contrary to the Court's specific retention of jurisdiction, Mandate was issued herein on August 14, 1991 (see Exhibit 2 hereto).

Subsequent telephone inquiries to the Clerk's office have not been productive of clarification in view of the issue of Mandate.

The Court has inherent power to protect the integrity of its own processes and can recall the Mandate. *Briggs v. Pennsylvania R. Co.*, 68 S. Ct. 1039, 334 U.S. 304, 92 L. Ed. 1403 (1948); *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988); *Watson v. Estelle*, 859 F.2d 105, 886 F.2d 1093, 1094 (9th Cir. 1988); *ASTA of California, Inc.*, 754 F.2d 1394, 1395 (9th Cir. 1985); *Verilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977); *Perkins v. Standard Oil Co. of California*, 487 F.2d 672, 674 (9th Cir. 1973).

The power to recall a Mandate is sparingly exercised but is appropriate under the special circumstances present here in order to both prevent injustice and to correct the mistake under which the Mandate was issued.

Intervenors/appellants ask the Court recall the Mandate issued herein so the matter may proceed on the merits.



Respectfully submitted this 18th day of September, 1991.

GUST, ROSENFELD &
HENDERSON

By _____
James F. Henderson
Attorneys for
Intervenors/Appellants
Robert D. Park and
Arizonans for Official
English

CERTIFICATE OF SERVICE

I, JAMES F. HENDERSON, attorney for Intervenors/Appellants Robert D. Park and Arizonans for Official English, hereby affirm that one (1) copy of Intervenors/Appellants Motion to Recall Mandate was mailed this 18th day of September, 1991, to each of the following:

Mr. Grant Woods
Attorney General
Ms. Rebecca W. Berch
Solicitor General
1275 West Washington Street
Phoenix, Arizona 85007
Attorneys for Defendant/Appellant
State of Arizona and Robert K. Corbin

Mr. Robert J. Pohlman
Ryley, Carlock & Applewhite
Suite 2600
101 North First Avenue
Phoenix, Arizona 85003-1973
Attorneys for Plaintiff/Appellee
Maria-Kelly F. Yniguez

_____
James F. Henderson

EXHIBIT 1

LAW OFFICES OF
GUST, ROSENFELD & HENDERSON

Reply to Phoenix Office

3300 Valley Bank Center
201 North Central Avenue
Phoenix, Arizona
85073-3300
(602) 257-7422
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Tucson Office
1660 Security Pacific Bank Plaza
33 North Stone Avenue
Tucson, Arizona
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(602) 628-7070
Telecopier: (602) 624-3849

July 31, 1991

Ms. Cathy A. Catterson, Clerk
United States Court of Appeals
Ninth Circuit
Post Office Box 549
San Francisco, CA 94101

Re: Maria-Kelly F. Yniguez, et al., v. State of Arizona
Docket Nos. 90-15526 and 90-15581 Our File No. 010604-00004

Dear Ms. Catterson:

We acknowledge receipt of the court's opinion filed July 19, 1991 in the above matter. That opinion reversed a trial court decision and permitted Robert D. Park and Arizonans for Official English to intervene in the action.

The last sentence of the opinion states that "We shall retain jurisdiction over the appeal of the District Court's decision on the merits."



It is our understanding the court intends to proceed on the merits without sending the matter back to the District Court first. If this understanding is correct, we assume we will receive a briefing schedule following the date on which a mandate normally issues.

Would you please clarify the court's intention and advise if our understanding is correct.

Thank you for your aid and courtesies in this matter.

Yours very truly,

James F. Henderson
For the Firm

cc: Mr. Robert J. Pohlman
Mr. Anthony B. Ching
Mr. Robert D. Park

EXHIBIT 2

Office of the Clerk
United States Court of Appeals
for the Ninth Circuit
50 U.N. Plaza, Rm. 59
San Francisco, CA 94102-4909

August 14, 1991

USDC, Phoenix
District of Arizona (Phoenix)
U.S. Courthouse
230 N. First Ave.
Room 1400
Phoenix, AZ 85025

| C.A. NO. TITLE | AGENCY/ D.C. NO. |
|---|---|
| 90-15546 Yniguez v. State of Arizona | CV-88-1854-PGR |
| 90-15581 Yniguez v. Mofford | CV-88-1854-PGR |

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter.

[x] Certified copy of the Decree of the Court

[ ] Judgment of the National Labor Relations Board

[ ] Certified copy of the Entry of Dismissal;

The record on appeal will follow under separate cover.



Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: Sylvia McAlister
Deputy Clerk

Enclosure(s)
All counsel, without enclosures

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA-KELLEY F. YNIGUEZ; JAIME P. GUTIERREZ,

Plaintiff/Appellees,

and

ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

Intervenors/Plaintiffs-Appellees

and

STATE OF ARIZONA; ROSE MOFFORD; ROBERT CORBIN, et al.,

Defendants-Appellees.

v.

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARKS,

Intervenors-Defendants-Appellants.

No. 92-17087

D.C. No.
CIV 88-01854-PGR

**MOTION TO MODIFY OPINION**



MARIA-KELLEY F. YNIGUEZ,

Plaintiff-Appellee,

v.

STATE OF ARIZONA; ROSE MOFFORD, ROBERT CORBIN, et al.,

Defendants-Appellants.

and

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARKS,

Intervenors-Defendants-Appellants.

No. 93-15061

MARIA-KELLEY F. YNIGUEZ;

Plaintiff/Appellee

v.

STATE OF ARIZONA; ROSE MOFFORD; ROBERT CORBIN, et al.,

Defendants-Appellants.

No. 93-15719

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

(NO. CV88-1854-PGR)

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, cross-appellees State parties respectfully

request the Court to modify Section IV of its Opinion in *Yniguez v. State*, Nos. 92-17087, 93-15061, and 93-15719, Slip Op. at 15145 (9th Cir. Dec. 7, 1994) by adding the following footnote after the first sentence in Section IV:

> **Footnote No. 28a** The State of Arizona expressly waived its right to assert the Eleventh Amendment as a defense to the award of nominal damages.

This request for modification of the opinion is supported by the attached letter from the Attorney General of the State of Arizona to Mr. Robert Pohlman, counsel for Plaintiff Yniguez, expressly waiving the State's Eleventh Amendment immunity from the award of nominal damages.

The modification is requested because, without the waiver, this Court lacks jurisdiction to award nominal damages against the State of Arizona or the Governor of Arizona acting in his or her official capacity. *See Draper v. Coombs*, 792 F.2d 915, 918 (9th Cir. 1986). The State parties thus wish to clarify that the Court's opinion does not authorize an award of nominal damages against the state or a state official acting in his official capacity absent an express waiver.

DATED this 20th day of December, 1994.

GRANT WOODS
Attorney General

/s/ Paula S. Bickett
PAULA S. BICKETT
Acting Solicitor General
1275 West Washington Street
Phoenix, Arizona 85007
Telephone No. (602) 542-3333

Attorneys for State Parties

---



CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 1994, I served the foregoing Motion to Modify Opinion upon the Plaintiff-Appellees, Intervenors-Defendants-Appellants, and Intervenor-Appellee through their attorneys, by mailing two copies of the same, postage prepaid, to the following addresses:

Robert J. Pohlman, Esq.
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Attorneys for Intervenors-Appellants

/s/ Paula S. Bickett
PAULA S. BICKETT

---

(LOGO)

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

1275 West Washington, Phoenix 85007-2928

GRANT WOODS
ATTORNEY GENERAL

Main Phone: 542-5025
Telecopier: 542-4085

December 20, 1994

Robert J. Pohlman, Esq.
Ryley, Carlock & Applewhite, P.A.
101 North First Avenue, Suite 2700
Phoenix, Arizona 85003-1973

Re: *Yniguez v. State*
(Nos. 92-17087, 93-15061, 93-15719)

Dear Mr. Pohlman:

I am writing to notify you that the State of Arizona waives its right to assert its Eleventh Amendment immunity from the award of nominal damages in *Yniguez v. State*.

Sincerely,

/s/ Grant Woods
Grant Woods
Attorney General

cc: James F. Henderson
Barnaby W. Zall
Stephen G. Montoya

(30)

Supreme Court, U.S.
FILED
JUL 26 1996
OFFICE OF THE CLERK

No. 95-974

# In the Supreme Court of the United States

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,
PETITIONERS,

*v.*

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,
RESPONDENTS.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF OF RESPONDENTS ARIZONANS AGAINST CONSTITUTIONAL TAMPERING AND THOMAS ESPINOSA IN SUPPORT OF THE JUDGMENT

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July 26, 1996

61 pp

BEST AVAILABLE COPY

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## QUESTIONS PRESENTED

1. Does a state law forbidding state elected officials from communicating with their constituents in languages other than English "during the performance of government business" violate the free speech clause of the first amendment?

2. Do petitioners have standing to maintain this action?

3. Does this dispute present a case or controversy?

## SUMMARY OF ARGUMENT

Arizonans Against Constitutional Tampering ("AACT") is a political action committee consisting of multilingual state elected officials, state employees and citizens of Arizona. Members of AACT both render and receive official state communications regarding matters of public concern in languages other than English. Members of AACT have a right to disseminate and accept such communications under the free speech clause of the first amendment. *See, e.g., Bond* v. *Floyd,* 385 U.S. 116, 132-33 (1966), and *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 757 (1976). This right is essential to the integrity of the democratic process, and Article 28's abridgement of that right is unprecedented. For this reason, the three state and federal appellate panels to have considered Article 28 have uniformly declared it facially invalid on free speech grounds. *See Yniguez* v. *Arizonans for Official English,* 42 F.3d 1217 (9th Cir. 1994), *Yniguez* v. *Arizonans for Official English,* 69 F.3d 20 (9th Cir. 1995) (en banc), and *Ruiz* v. *Symington,* No. 1 CA-CV 94-0235 (Ariz. App. 1996).

Article 28 is an extremely detailed and precisely drafted language regulation. Its chief characteristic is its applicability to every level of state government. Article 28 provides that "English is the language of the ballot, the public schools and all governmental functions and actions." Ariz. Const., Art. 28, § 1(2). It applies to "the legislative, executive and judicial branches of government," and to "all political subdivisions, departments, agencies, organizations, instrumentalities, local governments and municipalities" of Arizona, including "all government officials and employees during the performance of government business." *Id.,* § 1(3)(a)(iv). Article 28 requires that "[t]his State and all political subdivisions of this State shall act in English and in no other language," and "prohibit[s] [t]his State from using or requiring the use of languages other than English. . . ." *Id.,* § 3(1)(a). Based on this uniformly broad language, Article 28 is "by far the most restrictively worded official-English law to date." M. Arrington, Note, *English Only*



*Laws and Direct Legislation: The Battle in the States Over Language Minority Rights,* 7 J. L. & Pol., 325, 327 (1991).[1]

Because Article 28 expressly forbids state elected officials from communicating with their constituents in languages other than English "during the performance of government business," Article 28 proscribes "core" political speech and violates the free speech guarantee of the first amendment. *See Colorado Republican Campaign Committee* v. *F.E.C.,* 64 U.S.L.W. 4663, p. 22 (1996). As the United States Court of Appeals concluded in the *en banc* proceeding below,

> Freedom of speech is the foundation of our democratic process, and the language restrictions of Article [28] stifle informative inquiry and advocacy by elected officials. . . . Elected representatives cannot fully serve their constituents if they are precluded from fully expressing their views to, and learning the views of, those constituents. The First Amendment precludes an electoral majority from restricting political communications with a certain segment of the electorate.

*Yniguez* v. *Arizonans for Official English,* 69 F.3d 920, 950-951 (9th Cir. 1995) (Brunetti, J., concurring), Petitioners' Appendix, pp. 62-64. As this Court acknowledged in *New York Times* v. *Sullivan,* 376 U.S. 254, 273 (1963), the first amendment was designed to "secure the widest possible dissemination of information from diverse and antagonistic sources."

Based exclusively on unsubstantiated fears of "ethnic distrust and separatism," Article 28 threatens to restrict and homogenize the dissemination of information by restricting the politi-

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[1] *See also* D. Baron, *The English-Only Question,* p. 21 ("[A]rticle 28 . . . is the most restrictive of the current wave of official-language laws. . . .") (1990), and J. Crawford, *Hold Your Tongue,* p. 176 (1992) ("Arizona's [Article 28 is] so far the most restrictive [Official English] measure"). The decision below also compared Article 28 with other Official English laws and acknowledged Article 28's unique breadth. *See* Petitioners' Appendix, 12a ("official-English" provisions [outside of Arizona] appear to be primarily symbolic").

cal speech of state elected officials and their constituents. For this simple but fundamental reason, the judgment below should be affirmed.

## ARGUMENT

### I. Article 28 Proscribes Core Political Speech And Is Subject to Strict Scrutiny.

The first amendment forbids the state from proscribing the content of speech absent clear proof of immediate, significant and demonstrable harm. *See Texas* v. *Johnson*, 491 U.S. 397 (1989). A successful electoral majority may not lawfully silence a minority by imposing restrictions or disparate burdens on the minority's political communications. *See United States* v. *Eichman*, 496 U.S. 310 (1990). Based on these principles, prohibitions of speech regarding matters of public concern are subject to the highest level of scrutiny under the first amendment. *See NAACP* v. *Button*, 371 U.S. 415, 438-439 (1963).

Regulations prohibiting foreign language speech have long-standing antecedents and do not constitute permissible "content-neutral" restrictions of speech. As Thomas Sowell has observed:

> One small but common example of the arrogance of conquerors has been their refusal to learn the languages of the conquered peoples, while *forcing* the latter to learn their language. It was more than two centuries after the Norman conquest of England before there was a king of England who spoke more than a few words of English. Laws and parliamentary proceedings were in French, which was also the language of social discourse among the aristocracy, while the English language and culture remained that of the masses and of the lesser gentry. In other societies as well, the elite among the conquered people have often adopted the language and culture of the new elite, even as junior partners. Thus, in a later era, English spread around the world as the language of the educated classes among the conquered



> peoples in the British Empire — continuing as the world's most widely spoken language, long after the empire itself had disappeared.

T. Sowell, *Race and Culture*, pp. 71-72 (1994) (emphasis supplied). Examples of language proscriptions are common. The English banned the use of Welsh from 1871 to 1939, the Turkish banned the use of Kurdish from the 1920s to the late 1980s, and, under the regime of General Francisco Franco, Spain banned the use of Catalan and Basque from 1938 to the middle 1950s. *See generally*, R. Wardhaugh, *Languages in Competition*, pp. 84, 123 (1987), and *Cambridge Encyclopedia of Language*, p. 34 (1987). In the United States, as shown in Section D below, various language proscriptions were imposed during the World War I era, and some of this Court's first free speech cases considered foreign language speech. *See, e.g.*, *Frohwerk* v. *United States*, 249 U.S. 204 (1919) (German), *Abrams* v. *United States*, 250 U.S. 616 (1919) (Yiddish), and *Schaefer* v. *United States*, 251 U.S. 466 (1920) (German).[2]

Although increased tolerance for language diversity was engendered after the war by this Court's opinion in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), Margaret Blanchard notes that:

> Trying to force immigrants to use the English language or requiring their children to learn it refused to die. In the 1980s, it would again be popular in areas where large Hispanic populations congregated. The underlying concerns in both eras was the need to make residents of the United States alike in language, thought, and action.... Americans continue to harbor a substantial fear of foreign people, foreign languages, and foreign ideas. The Supreme Court decision in 1923 [in

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[2] Hostility to foreign people, foreign languages and foreign ideas also inspired the Alien and Sedition Acts of 1798, which the Court identified as having "first crystallized a national awareness of the central meaning of the First Amendment." *New York Times* v. *Sullivan*, 374 U.S. 254, 273 (1964). *See generally* J. Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*, pp. 56-58 (1956).

> *Meyer* v. *Nebraska*] turned back that era's effort to require English-language instruction, but it did little to defuse that fear.

M. Blanchard, *Revolutionary Sparks*, p. 126 (1992). *See also* S. Walker, *Hate Speech*, p. 34 (1994) ("The English Only movement of recent years is a distant echo of the earlier Americanization movement, an attempt to formally define Anglo-Saxon culture as the official version of Americanism and to impose it on everyone").

The unfounded fear of "foreign" languages is reflected in the motivations underlying Article 28:

> The State of Arizona is at a crossroads. It can move towards the fears and tensions of language rivalries and ethnic distrust, or it can reverse this trend and strengthen our common bond, the English language.
>
> . . . . .
>
> [L]anguage conflicts and ethnic separatism threaten to erode our common bond. . . . This amendment will stop this erosion. . . .

*See* Legislative Council Arguments Favoring Proposition 106, Joint Appendix, 26. *See also* Robert D. Park, Chairman, Arizonans for Official English, Argument "For" Proposition 106, Joint Appendix, 27 ("Officially sanctioned multilingualism causes tension and division within a state. Proposition 106 will avoid that fate in Arizona"). Based on these statements, it is clear that Article 28 was designed to directly proscribe an entire category of pure speech. Thus, unlike content neutral restrictions motivated by reasons unrelated to the communicative impact of speech, *see, e.g., Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), laws proscribing foreign language speech reflect a choice that is quintessentially political in purpose.

Language proscriptions also have a decidedly non-neutral impact on the content of speech. As this Court acknowledged



in *Hernandez* v. *New York*, 500 U.S. 352, 370 (1991), "[l]anguage permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond." *See also* Native American Language Act, 25 U.S.C. § 2901(9) ("Languages are the means of communication for the full range of human experience and are critical to the survival of cultural and political integrity of any people"), and M. McDougal, H. Lasswell, & L. Chen, *Freedom from Discrimination in Choice of Language and International Rights*, 1 S. Ill. U. L. J. 151 (1976) ("language is a rudiment of consciousness and close to the core of personality; deprivations in relation to language deeply affect identity").

Moreover, by banning entire vocabularies of pure speech, Article 28 necessarily reduces the content of speech. Article 28 is no more a content-neutral restriction on speech than the prohibition on profanity invalidated by this Court in *Cohen* v. *California*, 403 U.S. 15 (1971). *See also Asian American Business Group* v. *City of Pomona*, 716 F.Supp. 1328, 1330 (C.D. Cal 1989) (restriction on use of foreign languages on business signs is a regulation of content).

Finally, but perhaps most importantly, Article 28 proscribes core political speech. Article 28 expressly forbids an elected representative from speaking in her official capacity with a non-English speaking constituent on a matter of public concern. This constitutes an unprecedented intrusion into core political speech subject to the most exacting level of first amendment scrutiny. *See Thomas* v. *Collins*, 323 U.S. 516, 529-31 (1945).

## II. Foreign Language Speech and the First Amendment.

### A. Polylingualism and the World of the Framers.

The Constitution of the United States . . . was

> made . . . for a people gathered and to be gathered from many nations and of *many tongues*.[3]

The public and private use of languages other than English has been a staple of every era of American history. Although English has always enjoyed linguistic primacy in the United States, this tradition has always coexisted with extensive polylingualism in both the private and the public spheres of American discourse. This tradition of linguistic tolerance has shaped and is a product of the principle of "the freedom of speech" guaranteed by the first amendment.[4]

The polylingualism of the founding era is well-known and has received considerable scholarly attention. *See generally* H. Kloss, *The American Bilingual Tradition* (1977). The polyglot nature of the Revolutionary period reflected the underlying ethnic diversity of the early American populace. The multi-ethnic foundations of Revolutionary America are most famously acknowledged in a 1776 pamphlet of fundamental importance to the Revolution — Thomas Paine's *Common Sense*:

> Europe, and not England, is the parent country of America. This new world hath been the asylum for the persecuted lovers of civil and religious liberty from *every part* of Europe. . . . Not one third of the inhabitants even of this province [Pennsylvania] are of English descent. Wherefore I reprobate the phrase of parent or mother country applied to England only, as being false, selfish, narrow, and ungenerous.

Thomas Paine, *Common Sense*, pp. 84-85 (1776) (Penguin Ed. 1986) (emphasis in original). Paine's remarks were echoed by Tench Coxe a decade later on September 26, 1787, just ten days after the Constitutional Convention adjourned during the debates on the ratification of the Constitution:

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[3] *Hurtado* v. *California*, 110 U.S. 516, 530-531 (1884) (emphasis added).

[4] When interpreting the first amendment, this Court frequently considers the free speech traditions of the era when the Constitution was drafted and ratified. *See, e.g., New York Times* v. *Sullivan*, 376 U.S. 254, 273-277 (1964).



> To take a proper view of the ground on which we stand, it may be necessary to recollect the manner in which the United States were originally settled and established. Want of charity in the religious systems of Europe and of justice in their political governments were the principal moving causes which drove the emigrants of various countries to the American continent. The Congregationalists, Quakers, Presbyterians and other British dissenters, the Catholics of England and Ireland, the Huguenots of France, the German Lutherans, Calvinists, and Moravians, with several other societies, established themselves in the different colonies, thereby laying the ground of that catholicism in ecclesiastical affairs which has been observable since the late revolution: Religious liberty naturally promotes corresponding dispositions in matters of government.

1 *The Debate on the Constitution*, p. 20 (1787) (B. Bailyn ed. 1993).[5]

Contemporary scholarship confirms these demographic observations. As Richard Hofstadter has written:

> During the eighteenth century, . . . the ethnic homogeneity [of seventeenth-century America] was rudely and finally shattered, as Germans, Swiss, Scotch-Irish, Africans, and peoples of other stock migrated or were imported in such substantial numbers that by the time of the Revolution half the population south of New England was non-English.

R. Hofstadter, *America at 1750: A Social Portrait*, p. 17 (1971). Similarly, Robert Wells observes that:

> By 1775 the population of Britain's colonies was increasingly not English. One out of every five Americans

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[5] *See also* J. Hector St. John de Crevecouer, *Letters from an American Farmer*, p. 68 ("What is an American?. . . . They are a mixture of English, Scotch, Irish, French, Dutch, Germans, and Swedes.") (1782) (Penguin Ed. 1986).

> traced his or her roots to Africa, not Europe.... Although a few non-English had come to the colonies before 1700, after that year Germans, Irish, Scots, and Welsh all began to move to America. The traditional estimate was that about 30% of the total population were whites other than from England. In the eighteenth century, Scots and Welsh, as well as Germans, were quite different from the English and proudly conscious of that fact. Recently, a new estimate of the ethnic composition of the United States in 1790 (which should reflect the situation in 1775) has suggested that there were [even] more non-English than previously thought.

R. Wells, "Population and Family in Early America," in *The Blackwell Encyclopedia of the American Revolution*, p. 45 (1994).

The ethnic diversity of the Revolutionary era has import beyond mere cultural history. The years immediately preceding the Revolution witnessed the largest influx of immigration in the history of the new world. *See* B. Bailyn, *Voyagers to the West*, pp. 24-28 (1986). Absent the population growth attendant to this immigration wave, the thirteen colonies would have lacked the human capital that proved essential to the success of the Revolution. *See* R. Wells, "Population and Family in Early America," in *The Blackwell Encyclopedia of the American Revolution*, pp. 39, 50 (1994). American Independence rests in large measure on the collective efforts of these Americans of English, Scottish, Irish, Dutch, German, French, and African descent.

This diverse ethnic mix resulted in a correspondingly diverse linguistic mix.

> The sounds of Africa, Europe, the Mediterranean, and the West Indies enriched the coastal air [of eighteenth-century America] as much as did the spices and aromas of various ethnic cuisines.... We tend to forget that passionate conversations about religion and politics, as well as family matters, were as likely to be thought



> through and spoken in vigorous German, French, Dutch, Yoruba, Gullah, Spanish, Swedish or Farsi....

Norman S. Grado, "The Cultural Effects of the Revolution," in *The Blackwell Encyclopedia of the American Revolution*, p. 579 (1994). It is also important to note in this regard that many of the Scottish, Welsh and Irish emigrants in Revolutionary America spoke Gaelic (and dialects thereof) and were unable to communicate in English. *See* B. Bailyn, *Voyagers to the West*, pp. 575-576 n.2 (1986), and R. Morris *Witnesses at the Creation*, p. 121 (1985).

In addition to multiple languages native to Europe and the British Isles, over one thousand Native American languages were spoken in eighteenth-century America. *See* A. Josephy, *The Indian Heritage of America*, pp. 12-15 (1968). The prevalence of these indigenous tongues had a significant impact on the European settlers of early America:

> Traveling in New York in 1776, Joseph Bloomfield, then a captain in the Third New Jersey Regiment and later governor of New Jersey, heard spoken on a daily basis English, High Dutch, Low Dutch, French, Mohawk, Oneida, Seneca, Cayuga, Onondaga, and Tuscarora.

C. Calloway, *The American Revolution in Indian Country*, p. 17 (1995). Indigenous languages were so pervasive during the Revolutionary era that the European settlers "incorporated Algonkian, Iroquoian, and Muskhogean terms into their vocabulary." *Id.* (In fact, like several other states, the Commonwealth of Massachussetts is named after a Native American tribe.) The European settlers also strived to communicate with the natives in their indigenous tongues. One of the largest printings in the history of the Colonial American press involved a translation of the Bible into a Native American tongue. *See* L. Wroth, *The Colonial Printer*, p. 17 (1964). Commonly known as the "Eliot Indian Bible," approximately 2500 copies of the text were printed in Cambridge, Massachusetts by 1665. *Id.*

African-Americans — who comprised approximately one fifth of the inhabitants of Revolutionary America — also spoke various African-related dialects. As Stephanie Grauman Wolf observes:

> The many languages of Africa were integrated with each other [in eighteenth-century America], as well as with English, to form the Creole languages distinctive in different parts of the southern colonies. We are familiar with the Gullah tongue of the islands of the eastern coast of South Carolina because it has survived into the twentieth century, but many contemporaries noticed Virginia blacks spoke a special "mixed dialect between Guinea and English," while a missionary in 1748 reported that blacks in the Chesapeake had "a language peculiar to themselves, a wild confused medley of Negro and corrupt English, which makes them very unintelligible except to those who have conversed with them for many years."

S. Wolf, *As Various as Their Land: The Everyday Lives of Eighteenth-Century Americans*, p. 264 (1993). Like their European counterparts in the new world, African-Americans took pride in their various tongues and were reluctant to forsake them in favor of English. *Id. See also* J. Blassingame, *The Slave Community*, p. 25 (1979).

Foreign language speech was not limited to the spoken word; the foreign language press was active throughout the Revolutionary era. Benjamin Franklin published the first German language newspaper in America in 1732 — the "*Philadelphische Zeitung.*" *See* K. Bartel, "German and the Germans at the Time of the American Revolution," 60 *Modern Language Journal*, p. 98 (1976). Approximately thirty-eight different German-language newspapers were published in America between 1732 and 1800. *See* K. Conzen, "Germans," *Harvard Encyclopedia of American Ethnic Groups*, p. 409 (1980). In fact, John Peter Zenger was a "poorly educated German immigrant" who probably spoke more German than English, and one of the first significant controversies in America regarding



freedom of the press and the law of seditious libel involved a 1758 edition of the "*Philadelphische Zeitung*," apparently no longer owned by Benjamin Franklin by that time. *See* L. Levy, *Emergence of a Free Press*, pp. 39, 52 (1985), and J. Allen, *Printers and Press Freedom*, pp. 132-134 (1988).

One of the most important foreign language newspapers published during the Revolutionary era was the "*Wochentliche Pennslyvanische Staatsbote.*" *See* B. Bailyn, *Voyagers To The West*, pp. 62, 310, 402 (1986). In addition, "[t]wo Pennsylvania magazines were issued in the German language, and Samuel Hall, in 1789, brought out twenty-six issues of a periodical in French with the title, *Courier de Boston.*" L. Wroth, *The Colonial Printer*, p. 239 (1964). The significance of the foreign language press in Colonial America is evidenced by the fact that "the largest book produced in the colonies before the Revolution" was *Der Blutige Schau-Platz*, a massive 756 page Mennonite book of prayer published in German. *Id.* at pp. 259-260. Indeed, Germans played a singularly influential role in the creation and development of the publishing industry in eighteenth-century America. *Id.* at pp. 72-77, 87, 95, 103-104, 117-118, 126-129, 259-263.

Government communications in the Revolutionary era reflected the linguistic diversity of the period. In the public sphere at the national level, the Continental Congress published various official documents in English, German, and French editions, including the Articles of Confederation and the famous 1774 Address to the people of Quebec lauding the relationship between a free press and self-government. *See generally*, J. Perea, "Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English," 77 Minn.L.Rev. 269, 284-287 (1992). The Continental Congress also issued numerous other documents in German and French in connection with its successful efforts to recruit troops from these groups; eight companies of Germans from Maryland and Pennsylvania ultimately fought in the Continental army, all of which were probably commanded in the German tongue. *Id.*

As James Wilson noted at the Constitutional Convention, "almost all of the Gen[eral] officers of the Pen[nsylvania] line [in the Continental army] were foreigners." 2 M. Farrand, *The Records of the Federal Convention,* p. 269 (1937).

America's alliance with France during the Revolution also often necessitated official communications in French. George Washington is probably the only major founding father who was not fluent in French. With the appointment of several high ranking French officers to the Continental army, Washington's "councils of war became increasing bilingual," with Alexander Hamilton often serving as translator. *See* J. Flexner, *Washington: The Indispensable Man,* p. 101 (1969), and 1 *The Debate on the Constitution,* p. 1008 (B. Bailyn ed. 1993). The founding generation was so comfortable conversing in French in official settings that Benjamin Franklin's concluding remarks on the last day of the Constitutional Convention (which were read for a weary Franklin by James Wilson) ended with a French quip, "*Il n'y a que moi qui a toujours raison.*" 1 *The Debate on the Constitution,* p. 3 (B. Bailyn ed. 1993).

Official polylingualism was also common at the local level. In eighteenth-century Pennsylvania, "[i]n legal action[s] and court proceedings . . . , documents in German were just as valid as those in English." W. Parsons, "Representation of Ethnicity Among Colonial Pennsylvania Germans," in F. Shuffelton, *A Mixed Race: Ethnicity in Early America,* p. 120 (1993). Similarly, under the leadership of Benjamin Franklin, petitions in German (and English) were distributed to be signed by the electorate and submitted by the Pennsylvania Assembly to the British Parliament requesting that the Penn proprietorship be abolished and replaced with a royal charter. *See* R. Middlekauff, *Benjamin Franklin and His Enemies,* pp. 87, 98-99 (1996).

The Pennsylvania polylingual tradition is especially instructive when considering the original understanding of "free speech" given the fact that Pennsylvania was the only state whose constitution had a "free speech" clause when the Bill of Rights was drafted and ratified in 1791. *See* L. Levy, *Emergence*



*of a Free Press,* p. 5 (1985). Moreover, the capital of Pennsylvania — Philadelphia — was the most populous, prosperous city in Revolutionary America, aptly described by Dr. Benjamin Rush as "the capital of the new world." Quoted in E. Foner, *Tom Paine and Revolutionary America,* p. 19 (1976). Reflecting its size, wealth, and sophistication, Philadelphia was the situs of the first Continental Congress, the writing of the Declaration of Independence, the writing of the Articles of Confederation, and the Constitutional Convention. The free speech tradition of this capital of Revolutionary thought is some of the best evidence of the early meaning of freedom of expression under the first amendment.

About half of the population of Philadelphia was either German or Irish, and these two linguistically distinct groups were active participants in the social and political life of the city. *See generally* E. Foner, *Tom Paine and Revolutionary America,* pp. 46, 48, 53, 55, 57, 64, 127-128, 163, 187 (1976). Germans were such a significant force in Pennsylvania politics that Benjamin Franklin feared that in time translators would be required in order for one half of the Pennsylvania Assembly to communicate with the other. *See* 4 *The Papers of Benjamin Franklin,* pp. 484-485 (1753) (Labaree ed. 1961). During the Revolutionary War, Germans served on Pennsylvania's Revolutionary Council and fought in the citizen's militia. *See* E. Foner, *Tom Paine and Revolutionary America,* p. 64 (1976). In 1788, Pennsylvania Germans even demanded proportional representation in the elections for the new federal congress and presidential electors. *See* G. Wood, *The Radicalism of the American Revolution,* pp. 245, 260-261 (1991). (The demand was dropped only when both political parties — the Federalists and the Anti-Federalists — recruited German candidates. *Id.*)

The English-speaking majority of Pennsylvania was not oblivious to the apparent threat posed to English primacy by the German tongue. Franklin's remarks about "the Palatine Boors . . . swarm[ing] into our settlements, and by herding together establish[ing] their language and manners to the exclusion of ours" . . . were well-known (and ultimately damaging to

his immediate political ambitions). *See* 4 *The Papers of Benjamin Franklin,* p. 227 (1751) (Labaree ed. 1961), and R. Middlekauff, *Benjamin Franklin and His Enemies,* pp. 87, 98-99 (1996). As Richard Middleton observes:

> The numbers [of Germans in Pennsylvania] were so high that fears were expressed for the survival of the English inhabitants. In 1727 a bill was passed requiring all immigrants to take an oath of loyalty, and in the early 1740s there was talk of barring anyone from office who did not speak English, the first demonstration of that phenomenon known as nativism.

R. Middleton, *Colonial America,* pp. 343-344 (1992). Notwithstanding these fears, no action prohibiting the private or official use of foreign languages was ever taken, and the primacy of English endured in Pennsylvania throughout the eighteenth century (and beyond).[6]

Pennsylvania's polylingual tradition was not unique. "An estimated 10 percent of the pre-Revolutionary population was German-speaking, . . . [and Georgia's] population was so polyglot that a successful magistrate needed to speak fluently in at least three languages and preferably four. . . ." B. Bailyn, *The Peopling of British North America,* pp. 16-17 (1986). New York, Maryland, Virginia, North Carolina, South Carolina, Florida, Alabama (then called "West Florida") and Louisiana also had significant polylingual communities during the Revolutionary era, speaking Dutch, French, German, Gaelic, Greek, Italian,

[6] Of course, the framers were well aware of the Pennsylvania polylingual tradition. The Constitutional Convention met in the Philadelphia State House while the polylingual Pennsylvania legislature was in session upstairs. *See* E. Morgan, *The Birth of the American Republic,* p. 150 (1992). In addition, when prejudice against foreigners surfaced at the Constitutional Convention, Scottish-born James Wilson (with Madison's support) attempted to neutralize the attack by attributing Pennsylvania's size and prosperity to immigration. Despite this prejudice, no one at the Constitutional Convention advocated or suggested any form of an English-only rule. *See* 2 M. Farrand, *The Records of the Federal Convention,* p. 269 (1937).



Spanish and other non-European languages. *See* B. Bailyn, *Voyagers to the West,* pp. 19, 25, 27, 455-461, 467, 478, 575-576 (1986).

The official polylingualism of the founding era is perhaps best illustrated by the definitive official expression of the original understanding of the "freedom of the press," a 1774 proclamation in French issued by the first Continental Congress to the people of Quebec in an attempt to obtain support for the Revolution. *See* D. Anderson, *The Origins of the Press Clause,* 30 UCLA 455, 463-464 (1983). The English language version of the Address states:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and the arts in general, in its diffusion of liberal sentiments on the administration of Government, in its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs.

1 *Journal of the Continental Congress,* p. 108 (1774).[7] The motto adopted for the new Nation — *"E pluribus unum"* — also reflects the official polylingualism of the era. The federal government was not alone in choosing a foreign language motto. The oldest extant flag of pre-constitutional America (from Bedford, Massachusetts) bears the Latin motto, *Vince aut Morirre,* (Conquer or Die). *See* D. Fischer, *Paul Revere's Ride,* pp. 162-163 (1994). Of the twelve states to participate in the Constitutional Convention, seven had foreign language mottos or official seals. *See* M. Bradford, *Founding Fathers* (1994).[8]

[7] Seven members of the first Continental Congress of 1774 participated in the Constitutional Convention of 1787. *See* R. Morris, *The Forging of the Union 1781-1789,* p. 269 (1987).

[8] Ironically, the Official Seal of the State of Arizona also contains a foreign language motto, *"Ditat Deus."*

Based on the express and unqualified language of the free speech clause itself and the pervasive private and official use of foreign language speech throughout the Revolutionary era, the framers of the first amendment obviously believed that foreign language speech constituted "speech" for first amendment purposes. Although the framers were acutely aware of the existence of foreign language speech in the public sphere — Franklin publicly lamented it — they did nothing to suggest that such speech could be lawfully abridged; to the contrary, they associated language proscriptions with the European oppression from which they had fled to America to avoid. As Justice Joseph Story explained in his *Commentaries on the Constitution*,

> The next clause of the amendment respects the liberty of the press. "Congress shall make no law abridging the freedom of speech, or of the press. . . ." A little attention to the history of other countries in other ages will teach us the vast importance of this right. It is notorious, that even to this day, in some foreign countries it is a crime to speak upon any subject, religious, philosophical, or political, what is contrary to the received opinions of the government, or the institutions of the country, however laudable may be the design, and however virtuous may be the motive. . . . The Bible itself, the common inheritance, not merely of Christendom, but of the world, has been put exclusively under the control of government; and not allowed to be seen, or heard, except in a language unknown to the common inhabitants of the country. To publish a translation in the vernacular tongue, has been in former times a flagrant offense.

J. Story, *Commentaries on the Constitution of the United States,* pp. 703-705 (1833).

These comments reflect the framers' original association of language restrictions with the religious and cultural oppression of Europe. A leading scholar in the history of American multilingualism, Shirley Heath, has noted:



> [E]arly political leaders recognized the close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on these freedoms.

S. Heath, "Language and Politics in the United States," in *Linguistics and Anthropology,* pp. 267, 270 (1977). Just as the framers rejected the idea of an established religion or a ministry of culture, they rejected the idea of an official language. *Id. See also* S. Heath, *A National Language Academy? Debate in the New Nation,* 11 *International Journal of the Sociology of Language,* p. 9 (1976).[9]

Professor Heath's findings in this regard are eloquently confirmed in Gordon Wood's Pulitzer Prize winning study, *The Radicalism of the American Revolution:*

> The revolutionary generation was the most cosmopolitan of any in American history. The revolutionary leaders never intended to make a national revolution in any modern sense. They were patriots, to be sure, but they were not obsessed, as were later generations, with the unique character of America or with separating America from the course of Western civilization. As yet there was no sense that loyalty to one's state was incompatible with such cosmopolitanism. . . . The truth was, said Thomas Paine in *Common Sense,* that Americans were the most cosmopolitan people in the world. They surmounted all local prejudices. They regarded everyone from different nations as their countryman and ignored neighborhoods, towns and countries as distinctions too limited for continental minds. . . . America, by uniting the different kindred of the earth, had a duty to eradicate national prejudices and to make all humanity members of one extensive family.

G. Wood, *The Radicalism of the American Revolution,* pp. 222-223 (1991) (internal quotation marks omitted).

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[9] Even the most famous proponent of a "National Language" — Noah Webster — believed that legislation in the area of language was superfluous and contrary to the sovereignty of the American people. *See* D. Boorstein, *The Americans: The Colonial Experience,* p. 288 (1958).

Article 28 is a radical repudiation of this foundational free speech tradition.

### B. Polylingualism and the Fourteenth Amendment.

The linguistic diversity of the founding era did not end with the ratification of the Constitution and the Bill of Rights. The polylingual tradition continued unabated in nineteenth-century America and is richly illustrated in the Civil War and Reconstruction years. A brief examination of this transformative period of constitutional history is necessary to appreciate the fourteenth amendment's impact on the free speech rights of minority groups.

The jurisprudential roots of the fourteenth amendment lay in the ideology of the abolitionists and the radical Republicans. *See generally,* J. TenBroek, *The AntiSlavery Origins of the Fourteenth Amendment* (1951), and H. Trefousee, *The Radical Republicans: Lincoln's Vanguard for Racial Justice,* pp. 15-19 (1969). Long before the equal protection clause was ratified by the several states in 1868, opponents of slavery had articulated a theory of equality under law ultimately derived from the Declaration of Independence and the natural rights tradition. *See* W. Wiecek, *The Sources of AntiSlavery Constitutionalism in America,* pp. 264-265 (1977), and L. Litwack, *North of Slavery,* p. 9 (1961). These ideas served as the conceptual predicate for the substantive provisions of the fourteenth amendment and shaped the evolution of the free speech rights of minorities. *Id. See also* M. Curtis, *No State Shall Abridge,* pp. 42-56 (1986).

Wendell Phillips was one of the most influential spokesmen of the abolitionist cause in the Civil War era. *See* J. McPherson, *The Struggle for Equality,* pp. 51, 127-128, 366 (1966). His basic views on equality during the antebellum period reflected a growing Northern majority. *Id.* Soon after the firing on Fort Sumter in 1861, Phillips concluded his most famous speech by affirming his faith in the principle of equality:

> I believe in the possibility of justice, in the certainty of union. Years hence, when the smoke of this conflict clears away, the world will see under our banner *all*



> *tongues,* all creeds, all races — one brotherhood — and on the banks of the Potomac, the Genius of Liberty, robed in light, four and thirty stars for her diadem, broken chains under her feet, and an olive branch in her right hand.

*Id.* at p. 51 (emphasis added). Over two hundred thousand copies of this speech were distributed throughout the Union, making it one of the most widely read pieces of abolitionist literature in the history of the movement. *Id.* The ideal of equality expressed in Phillips' speech was standard abolitionist partyline and was echoed by another leading abolitionist of the era, Samuel J. May of New York:

> [The mission of America] was to show the world that *all* men, not white men alone, but all, of every complexion, language and lineage have equal rights to life, liberty and the pursuit of happiness. . . .

*Id.* at p. 228 (emphasis in original).

These views were shared by many Republicans in the early 1860's. *See* A. Amar, *The Bill of Rights and the Fourteenth Amendment,* 101 Yale L.J. 1193, 1275-77 (1992). For instance, in 1861 Abraham Lincoln — when criticizing a proposed amendment to the Massachusetts' constitution imposing a two year residency requirement on voting by naturalized citizens — explained that:

> I have little notoriety for commiserating the oppressed condition of the negro, and I should be strangely inconsistent if I could favor any project for curtailing the existing rights of white men, even though born in different lands, and speaking different languages from myself.

D. Donald, *Lincoln,* p. 231 (1995). In fact, the influential "German-wing" of the Republican party led by (German-born and German-speaking) Carl Schurz effectively purged or silenced any significant nativist sentiments in the party by the end of the 1850s. *See* E. Foner, *Free Soil, Free Labor, Free Men,*

p. 257 (1995). Due to the efforts of Schurz and his associates, the Republican platform of 1860 contained an anti-nativist plank opposing "any state legislation by which the rights of citizens hitherto accorded to immigrants from foreign lands shall be abridged or impaired; and in favor of giving a full and efficient protection to the rights of all classes of citizens, whether native or naturalized. . . ." *Id.* Thus, on the eve of the Civil War, both the abolitionists and the Republicans had publicly identified foreign language speakers as a class of individuals entitled to the equal protection of the laws.

By 1866, after Appomattox, the ratification of the thirteenth amendment, and the passage of the Civil Rights Act of 1866, these principles were orthodoxy for the radical and moderate Republicans who drafted the fourteenth amendment. *See generally* E. Foner, *Reconstruction,* p. 257 (1988). For example, Representative Thaddeus Stevens of Pennsylvania — the head of the House delegation to the Joint Committee on Reconstruction that officially reported the fourteenth amendment — explained that Reconstruction legislation passed pursuant to section two of the thirteenth amendment was designed to assure that "all laws be impartial, *without regard to language,* race or former condition." Quoted in D. Donald, *The Politics of Reconstruction, 1863-1867,* p. 58 (1965) (emphasis added). Representative Stevens also subsequently remarked that the fourteenth amendment required that "the same laws must and shall apply to every mortal, American, Irishman, African, German, or Turk." Quoted in W. Nelson, *The Fourteenth Amendment,* p. 116 (1988). Of course, based on their experience in state electoral politics, Representative Stevens and his colleagues knew that many members of these ethnic groups could not communicate effectively in English.

In accordance with this conception of equality — and ever mindful of their German-speaking colleagues and constituents — the Reconstruction framers refused to limit the right to vote to only those citizens who could read the Constitution and write their names in English. On June 27, 1866, during the first session of the 39th Congress, Senator Lot Morrill of Maine proposed an amendment to a suffrage bill for the District of Columbia requiring English literacy, contending that:



> I believe for the sake of unity, unity in our civilization, unity in our language, unity in our sentiments and opinions, that we ought to inculcate as a standard and a formula that the laws should always be printed in the English language; and so far as any [suffrage] qualification is concerned, certainly our civilization is worth but little in its influence and its effect upon aliens and foreigners, if at least we do not require them to speak our language.

*Congressional Globe,* 39th Cong., 1st Sess. 3433 (1866). In arguing against the proposed amendment, Senator Samuel Pomeroy of Kansas stated:

> [T]he man who becomes an American from choice, who looking over the ocean and seeing America, learning of our institutions, breathing somewhat of our freedom, longing to identify himself with us in this great struggle for self-government, comes here and voluntarily assumes the duties of a citizen, enters our Army, and carries our flag to victory; I say such a man, if he cannot write a word in English, is an American; he is a patriot; he is loyal; and he is entitled to vote.

*Id.* Senator Henry Wilson of Massachusetts echoed Pomeroy's views, exclaiming "why tell a German, a man of intelligence and character, that he must read the Constitution in the English language? Why say to the Frenchman, or to any foreigner who comes here, that he must be able to read and write in the English language? I think it is all wrong." *Id.* Based on these remarks, Senator Morrill voluntarily withdrew his proposed amendment without further debate. *Id.*

Senator Pomeroy's comments regarding immigrants "enter-[ing] our army and carr[ying] our flag to victory" were not hypothetical. As James McPherson observes,

> the substantial number of immigrants in the Union Army gave rise to the long-standing southern myth that the majority of Yankee Soldiers were foreign hirelings. . . . Of some two million white soldiers and sailors, half a million had been born abroad.

J. McPherson, *Battle Cry of Freedom,* p. 606 (1988). Of the half million foreign born soldiers serving in the Union Army — one forth of the entire armed forces — the majority were German or Irish, numbering 200,000 and 150,000 respectively. *See* B. Wiley, *The Life of Billy Yank,* p. 307 (1952). In addition to Germans and Irish,

> Swiss, French, Italian, Mexican and Polish representation in the Union Army was indicated by such regimental designations as the Swiss Rifles (Fifteenth Missouri); Gardes Lafayette (Fifty-fifth New York), commanded by Regis de Trobriand; Garibaldi Guard (Thirty-ninth New York); Martinez' Militia (First New Mexico); and Polish Legion (Fifty-eighth New York).

*Id.* at pp. 310-311.

The multi-ethnic composition of the Union Army made it correspondingly multilingual.

> The diverse national background of the Union soldiery manifested itself in many ways. One of the most noticeable of these was the babel of tongues that rose from the camps. The colonel of one regiment which included fifteen nationalities gave commands in seven different languages.... The most powerful influence in leveling barriers of nationality was the confidence and respect born of sharing hardship and danger. Courage in battle was the mark of a man, and the soldier who proved his bravery was not long disparaged for peculiarities of speech.

*See* B. Wiley, *The Life of Billy Yank*, pp. 310-311 (1952). Absent the contributions of these 500,000 soldiers, Union victory would have been dubious or more costly won. *See generally* B. Wiley, *The Road to Appomattox,* pp. 113, 119-120 (1956).

The polyglot nature of the Union Army reflected the polyglot nature of the Union. "*Heterogeneous* was the only adjective that could describe the American people [on the eve of the



Civil War].... [B]y 1850 the American population included representatives of almost every race and language in the world." D. Donald, *Liberty and Union,* p. 5 (1978) (emphasis in original). Ever cognizant of the importance of the foreign language vote, politicians in the Civil War era were careful to communicate with these voters in their native tongues. In 1856 then presidential candidate James Buchanan (a Pennsylvanian) had a campaign pamphlet discussing the controversy over slavery in the Kansas territory translated into German "for circulation in Pennsylvania's German counties." K. Stamp, *America in 1857,* p. 159 (1990). Similarly, in his unsuccessful 1858 senatorial campaign against Stephen Douglas, Abraham Lincoln had his famous "House Divided" speech (among others) translated into German to appeal to Illinois's influential German constituency. *See* D. Donald, *Lincoln,* pp. 211, 231 (1995). Carl Schurz and Gustave Koerner also campaigned extensively in German for Lincoln in the 1860 presidential election, and several scholars have argued that German support was essential to Lincoln's success in the election. *See* 2 A. Faust, *The German Element in the United States,* pp. 150-187 (1927), and E. Foner, *Free Soil, Free Labor, Free Men,* p. 259 n. 71 (1995).

The polylingualism of this foundational era of constitutional history is also illustrated by the publication of Minnesota's constitution of 1857 in English, German, Swedish, Norwegian and French, *see* J. Crawford, *Hold Your Tongue,* p. 44 (1992), California's constitution of 1849 in English and Spanish, Cal. Const. of 1849, and Louisiana's constitution of 1845 in English and French. *See Journal of the Proceedings of the Convention of Louisiana,* pp. 313-315 (1845).

Lastly, when considering the meaning of the fourteenth amendment, it is important to remember that the practice of slavery acted as a straightjacket on the first amendment that was not removed until the outbreak of the Civil War and the passage of the fourteenth amendment. As Akhil Amar observes:

> From the 1830's on, the abolitionist crusaders had understood that freedom of speech for all men and

> women went hand in hand with freedom of bodily liberty for slaves. The slave power posed a threat to freedom — of all kinds — and could support itself only through suppression of opposition speech, with gag rules on anti-slavery petitions, bans on "incendiary" publications, intrusions on the right of peaceable assembly, and so on.

A. Amar, *The Bill of Rights and the Fourteenth Amendment,* 101 Yale L.J. 1193, 1275 (1992). *See also* W. Freehling, *The Road to Disunion,* pp. 98-118, 289-352 (1990). Slavery's destructive impact on the first amendment was the subject of frequent petitions by citizens to the 39th Congress. For example, on January 30, 1866, Senator Howard of Michigan presented a petition from "certain German naturalized citizens of the United States residing in Detroit" seeking "prohibition of all restrictions of free speech, free press, free assemblage and free instruction." *Congressional Globe,* 39th Cong., 1st Sess. 494 (1886).

In light of the problem of slavery and free speech, by means of the fourteeth amendment, the 39th Congress sought to abolish the regulations, practices and customs that stifled free speech. As Justice Bradley acknowledged in his dissenting opinion in the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 123 (1873):

> The mischief to be remedied [by the fourteenth amendment] was not merely slavery, . . . [but also] that intoleration of free speech and free discussion which often rendered life and property insecure, and led to so much unequal legislation.

*See also,* C. Antieau, *The Original Understanding of the Fourteenth Amendment* pp. 24-25 (1981), and M. Curtis, *No State Shall Abridge,* pp. 32, 49-50, 56, 133-139 (1986).

The framers of the fourteenth amendment accomplished their free speech goals by incorporating an equal protection component into the concept of free speech which prohibited the imposition of state restrictions on speech based on subject matter or group classification. As Professor Amar explains:



> [T]he very meaning of freedom of speech . . . was subtly redefined in the process of being incorporated [into the fourteenth amendment]. In the eighteenth century the paradigmatic speaker was someone like John Peter Zenger or James Callender, a relatively popular publisher saying relatively popular things critical of less popular government officials. In the mid-nineteenth century the paradigm shifted to the Unionist, the abolitionist, and the freedman: to speakers like Samuel Hoar, Harriet Beecher Stowe, and Frederick Douglass. . . .
>
> The shift from Zenger and Callender to Hoar, Stowe, and Douglass was subtle but significant. All can be seen as "outsiders," but with an important difference. As representatives of the Fourth Estate, Zenger and Callender were outside the government that tried to censor them, but Hoar, Stowe, and Douglass were outsiders in a much deeper sense. Vis-a-vis the Southern society trying to suppress their speech, Hoar, Stowe, and Douglass were geographic, cultural, and ethnic outsiders who were critical of dominant social institutions and opinions. Put this way, this shift directs us away from Madison's first concern in *The Federalist* No. 51 (the "agency" problem of protecting the people against unrepresentative government), toward his second concern (protecting minorities from "factional" majority tyranny). The new First/Fourteenth Amendment tradition is less majoritarian and more libertarian. . . .
>
> The 1866 redefinition [of free speech] changed the central purpose . . . of freedom of speech, making central certain types of speech that had previously been far more peripheral: religious speech, artistic speech, and most importantly, minority speech.

A. Amar, *The Bill of Rights and the Fourteenth Amendment,* 101 Yale L.J. 1193, 1277-1278, 1282 (1992). Thus, when seen through the lens of the fourteenth amendment, the principle of free speech prohibits the imposition of disparate restrictions on

minority speech. As Senator Howard of Michigan stated in his famous speech presenting the final version of the amendment to the Senate floor, "[the fourteenth amendment] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Congressional Globe,* 39th Cong. 1st Sess. 2766 (1866). *See also, Barbier* v. *Connally,* 113 U.S. 27, 30 (1884) ("Class legislation, discriminating against some and favoring others, is prohibited [under the fourteenth amendment]").

The equal protection prohibition of "class legislation" was recently illustrated by this Court's opinion in *Romer* v. *Evans,* 64 U.S.L.W. 4343, 4355 (1996):

> It is not within our constitutional tradition to enact [class-based] laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Sweatt* v. *Painter,* 339 U.S. 629, 635 (1950) (quoting *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948)). Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) (quoting *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886)).

Like the provision invalidated by this Court in *Romer,* Article 28 "identifies persons by a single trait" (foreign language speech) and makes it "more difficult for one group of citizens than for all others to seek aid from the government." *Id.* at 4356. This regime clearly discriminates based on categories of



speakers and thus violates basic equal protection requirements. Indeed, the debates of the 39th Congress reveal a clear and consistent intent to prohibit the state imposition of disparate burdens on groups based on classifications of race, national origin, language, religion or ideological persuasion.

In sum, Article 28 defies the equal protection component of free speech. A class of individuals — foreign language speakers — specifically identified as being within the ambit of fourteenth amendment protection by the framers of the amendment is denied the right to communicate in the manner that its English-speaking counterparts freely enjoy. This is the very type of class-specific legal impediment that the fourteenth amendment was designed to abolish.

### C. Polylingualism and Development of Modern Free Speech Jurisprudence.

The American tradition of linguistic tolerance is reflected in the foundations of this Court's free speech jurisprudence. In the case that many scholars identify as the starting point of modern first amendment law, *Abrams* v. *United States,* 250 U.S. 616 (1920), the Court considered foreign language speech (Yiddish) and implicitly refused to distinguish between English and foreign language speech for first amendment purposes. In *Abrams,* several Russian Jewish emigres challenged their convictions under the Espionage Act of 1917 as violative of their free speech rights based on the fact that the only evidence of "espionage" consisted of distributing leaflets in English and Yiddish condemning America's involvement in the Russian Revolution.

Although the Court translated and considered the Yiddish leaflet in *Abrams,* which was apparently more "seditious" than its English language counterpart due to mistranslation, both the majority opinion by Justice Clarke and the legendary dissenting opinion by Justice Holmes treat the two languages as standing on equal footing for first amendment purposes.[10] Not

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[10] *See generally* R. Polenberg, *Fighting Faiths: The Abrams Case, The Supreme Court and Free Speech,* pp. 74-75, 234-238 (1987).

only does Holmes *not* suggest that foreign language speech on matters of public concern falls outside the scope of first amendment protection or is somehow entitled to less protection than English speech — to the contrary - - he concludes that it is virtually inviolate:

> In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had just as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.

*Abrams,* 250 U.S. at 629 (1920). Moreover, by equating an individual's right to advocate and criticize the government with the government's right to print the laws, Justice Holmes displays a masterful understanding of the theory of popular sovereignty predicating the first amendment discussed extensively forty years later in this Court's opinion in *New York Times* v. *Sullivan,* 376 U.S. 254, 273-277 (1963). (*See* Section D below.)

The Court also considered foreign language speech in the free speech context in *Frohwerk* v. *United States,* 249 U.S. 616 (1919), and *Schaefer* v. *United States,* 251 U.S. 466 (1922), both of which involved the question of whether speech published in three German-language newspapers — the *Missouri Staats Zeitung,* the *Philadelphia Tageblatt,* and the *Philadelphia Sonntagsblatt* — violated the Espionage Act of 1918. Although the Court translated the speech in question from German to English in both cases, it did not state or suggest that foreign language speech did not constitute "speech" under the first amendment. In fact, in his dissenting opinion in *Schaefer,* Justice Brandeis argued that the majority opinion's conclusion that Schaefer's speech was seditious was based on an inaccurate translation of the original German text, which he printed alongside the English language version, noting critically that



"[e]vidently both the jury and the trial judge failed to examine the German original." 251 U.S. at 488 (1922).[11]

This Court's implicit but uniform refusal to discriminate against foreign language speech in this important trilogy of free speech cases was no accident. Discrimination against the German language was both well-known and rampant during the World War I era. As Margaret Blanchard writes:

> In fact, [during the first world war] a whole subculture in American Society was virtually destroyed because of irrational fears.... [T]he American people were so frightened of and so enraged at anything German that almost all vestiges of that heritage were systematically eliminated in the United States. Individuals and communities with German sounding names anglicized them in order to avoid community-sponsored retribution. The German language was all but outlawed; German music could no longer be played; and sauerkraut was renamed liberty cabbage. The German-language press, which probably was the strongest of the ethnic presses at the start of the war, suffered terribly. No German newspaper was suppressed during the war, but several did lose second-class mailing privileges, or, in a few cases, all access to the mail. Most of them lost subscribers and advertisers and were as permanently crippled as the community they had served.

M. Blanchard, *Revolutionary Sparks,* p. 91 (1992). This background of discrimination against foreign language speech during the World War I era underscores the importance of the Court's refusal to subject it to reduced scrutiny in *Abrams, Frohwerk* and *Schaefer.*

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[11] Justice Brandeis' use of German in his dissent would have violated Article 28, which expressly applies to the judiciary and requires that all government "orders" be in English and "in no other language." Ariz. Const. art. XXVIII, §§ 1(3) and 3(1)(a).

Just thirteen months before the Court issued its opinion in *Abrams,* the Court of Chancery of New Jersey published its opinion in *New Yorker Staats-Zeitung* v. *Nolan,* 105 A. 72 (1918). In *Nolan* the court considered an application to enjoin the enforcement of an ordinance of the Township of North Bergen, New Jersey which prohibited "the circulation of newspapers in the German language. . . ." *Id.* In rejecting the Township's defense of the ordinance as a proper exercise of its police powers, the court noted that the federal government had sent numerous stories for the paper to publish in German:

> The government sends to the newspaper copy to be published. The government undoubtedly desires to reach a very large number of individuals of German extraction, who cannot understand English, through the medium of these newspapers so that they be advised as to the purpose of this country in the present war and so that they may be acquainted with the situation as it develops from day to day. There can be no question in my mind, but that is a wise thing to do. It is the only method of approach that can be at all efficacious. There are many thousands of Germans in this country, many of them in North Bergen, who cannot understand English. Anything which will prevent a national menace is justifiable. There is nothing more dangerous than a person left in ignorance of public events. We are confronted with a fact, not a theory. You cannot communicate with a person in a language he cannot understand. . . . My view is that the resolution, far from being in line with the war purposes of the government, is directly opposed to them.

*Id.* at 73. Although *New Yorker Staats-Zeitung* v. *Nolan* was not appealed, it did not escape this Court's attention and was approvingly cited in the first opinion by this Court to invalidate a state law on first amendment grounds, *Near* v. *Minnesota,* 283 U.S. 697, 719 n. 11 (1931).

Not all attempts to proscribe foreign language speech during this era were unsuccessful. In *Star Opera Company Co.* v. *Hylan,* 178 N.Y.S. 179 (Sup. Ct. 1919), the Supreme Court of New York refused to enjoin the Mayor of the City of New York from prohibiting the performance of German opera in the City. (The local American Legion had apparently persuaded the Mayor that censoring the performances was necessary to preserve the peace. *Id.*) Although the plaintiff opera company — the manager of which was "a German citizen who [was] charged with having stated that he [had] no intention of becoming an American citizen" — invoked the first amendment in its defense, the court announced (without explanation) that the "case [did] not deal with a constitutional right, or, in fact, any right at all." *Id.* at 181. (Of course, these assertions were never embraced by this Court.)



The first amendment implications of proscriptions of foreign language speech during the World War I era were not ignored by the scholarly community. In what is still one of the most influential academic tracts on free speech, *Free Speech in the United States,* Professor Zechariah Chafee of the Harvard Law School rejected any distinction between English and other languages for first amendment purposes and noted that:

> Even if it can be said the Blackstonian test [regarding prior restraints] does not forbid the government to control its own machinery, [for example,] the post-office, it is clear to every newspaper [advocating violent revolution] that its exclusion from the mails is equivalent to an absolute censorship. The same considerations apply to a censorship of the foreign language press. . . .

*Id.* at p. 169. In concluding that any problems arising from foreign language speech should be resolved non-coercively, Chafee argued:

> Just as the merits of free trade in goods are lessened if the normal processes of competition are checked by monopolies and dumping, so free trade in ideas requires that the barriers to the interchange of argument presented by illiteracy and foreign languages shall somehow be broken down. Aliens cannot be forced to love this country. They will love it rather because it

> does not employ force except against obviously wrongful overt acts. They will love it as the home of wise tolerance, of confidence in its own strength and freedom.

*Id.* at 240. These remarks reflect the principle of tolerance which predicates free speech jurisprudence.[12] *See generally,* L. Bollinger, *The Tolerant Society* (1986). As this Court acknowledged in *Meyer* v. *Nebraska,* 262 U.S. 390, 401 (1923):

> That the State may do much, go very far indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages, as well as to those born with English on their tongue. Perhaps it would be highly advantageous if all had a ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution — a desirable end cannot be promoted by prohibited means.

*See also Bartels* v. *Iowa,* 262 U.S. 404 (1923), *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 262 U.S. 404, 410 (1923), *Yu Cong Eng* v. *Trinidad,* 271 U.S. 500 (1926), and *Farrington* v. *Tokushige,* 273 U.S. 284 (1927) (all invalidating foreign language proscriptions as unconstitutional).

Although *Meyer* and its progeny were decided under the due process and equal protection clauses of the fourteenth amendment, the free speech implications of the decisions were apparent to contemporary observers. Justice Brandeis — who joined the majority opinion in *Meyer* without separate comment — later indicated to Felix Frankfurter that he based his decision on the "right to . . . utter speech." M. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 Sup. Ct. Rev. 299, 320. Professor Chafee also analyzed *Meyer* v. *Nebraska* under the rubric of free speech. *See* Z. Chafee, *Free Speech in the United States,*

[12] Of course, Professor Chafee is said to have greatly influenced Justice Holmes' dissent in the *Abrams* case. *See* R. Polenberg, *Fighting Faiths: The Abrams Case, The Supreme Court, and Free Speech,* pp. 222-24 (1987).



p. 552 (1941). This Court has also characterized *Meyer* as a first amendment case. *See Griswold* v. *Connecticut,* 381 U.S. 475, 482 (1965) (citing *Meyer,* the Court noted that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge").

Whether considered under the first or fourteenth amendments, these cases collectively teach that language proscriptions suppress free speech. As this Court observed in a substantively similar context:

> We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expressing of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

*Cohen* v. *California,* 403 U.S. 15, 24 (1971). Of course, if a speaker has a free speech right to use profanity in a courthouse, a speaker *a fortiori* has a free speech right to use a language other than English — especially when the speaker is unable to communicate in English and is communicating with an elected representative regarding matters of public concern.

Many members of Arizonans Against Constitutional Tampering fall into this latter category of speakers. Article 28 forbids their elected representatives from providing them with information readily available to English speakers although those representatives desire to provide it. Under the first amendment, these individuals have an enforceable right to receive that information. *See Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748-757 (1976). For them, the marketplace of ideas is meaningless without a marketplace of languages.

### D. Polylingualism and the Free Speech Rights of Elected Officials.

The free speech rights of elected officials are fundamental to representative government under the Constitution. These rights predate the free speech rights of members of the public at large and served as the conceptual model for the public right of "the freedom of speech" guaranteed by the first amendment. As Leonard Levy explains:

> The phrase "freedom of speech" originated in Anglo-American history during the struggle of Parliament to achieve the privilege of free debate.... Until the last quarter of the eighteenth century, freedom of speech referred not to a civil right but primarily to a parliamentary right: the legislator's immunity from punishment for anything said by him in his official capacity during a legislative session.

L. Levy, *The Emergence of a Free Press,* p. 3 (1983). *See also* Z. Chafee, *Free Speech in the United States,* p. 552 (1941) ("The earliest form of freedom of speech secured by the English Parliament was the immunity of its members from responsibility to the King or in the courts for what they said in debates").

The "parliamentary privilege" of free speech and debate enjoyed by members of Parliament in Georgian England was recognized by the British monarch when various magnates of the realm gradually forced the King to share his heretofore absolute and undivided sovereignty with them in the fifteenth century culminating in the English Bill of Rights of 1689, which declared "[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be questioned in any court or place out of Parliament." Quoted in A. White, *The Making of the English Constitution,* p. 446 (1925). The right was initially limited to members of Parliament, reflecting the fact that British sovereignty resided in the structure of government, not in the people at large. *Id.* at pp. 436-446.

The American Revolution transformed the parliamentary privilege into the "the freedom of speech" recognized by the



first amendment. *See generally* L. Levy, *The Emergence of a Free Press,* pp. 309-322 (1985). The framers of the Constitution believed that the legitimacy of government rested on the "consent of the governed." Under this theory of government, "sovereignty" rested with the people — not the King, the King-in-Parliament, Parliament alone, or any other governmental entity. *See generally* Z. Chafee, *Free Speech in the United States,* pp. 19-20 (1941) ("In the United States the people not the government possess the absolute sovereignty, and the legislature as well as the executive is under limitations of power"). As James Madison observed when arguing the unconstitutionality of the Alien and Sedition Acts, under the Constitution "[t]he people, not the government, possess absolute sovereignty." 4 *Elliot's Debates on the Adoption of the Federal Constitution,* pp. 569-570 (1845). Consequently, as attributes of sovereignty, the privileges of freedom of speech and debate rest with the people first and foremostly. *See generally* L. Levy, *The Legacy of Suppression,* p. 296 (1960) ("The intention of the framers of the First Amendment ... was to guarantee that the people possessed the same right of free discussion as their agents"). Thus, although historically "the freedom of speech" derived from and reflected the free speech rights of elected officials, this pattern was reversed by the American theory of popular sovereignty under which the free speech rights of elected officials derive from and reflect the free speech rights of the people at large. *See* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People,* p. 36 (1960).

When the people elected representatives to accomplish their collective purposes in government, the speech and debate of those representatives were to reflect the speech and debate of the people whom they represented. Jack Rakove observes that:

> If one maxim reflected Americans' ideas of representation ... it was the belief that a representative assembly "should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them."

J. Rakove, *Original Meanings,* p. 203 (1996), quoting John Adams, *Thoughts on Government* (1776). This definition of representation enjoyed a consensus at the Constitutional Convention. James Wilson declared that "[t]he Legislature ought to be the most exact transcript of the whole society." *Id.* George Mason proceeded to give what Edmund Morgan describes as "the standard American meaning of representation":

> The requisites in actual representation are that the Representatives should sympathize with their constituents; should think, as they think and feel as they feel . . . so much so, that even the diseases of the people should be represented — if not, how are they to be cured?

Quoted in E. Morgan, *Inventing the People,* p. 272 (1988). This theory of representation provided the "consent" that defined republican government under the Constitution. As Professor Bailyn explains:

> Where government was such an accurate mirror of the people, sensitively reflecting their desires and feelings, consent was a continuous, everyday process. In effect the people were present through their representatives, and were themselves, step by step and point by point, acting in the conduct of public affairs. No longer merely an ultimate check on government, they *were* in some sense the government. Government had no separate existence apart from them; it was *by* the people as well as *for* the people; it gained its authority from their continuous consent.

B. Bailyn, *The Ideological Origins of the American Revolution,* p. 173 (1967). Of course, this theory of consensual representation was contingent upon the ability of the elected to freely converse with their electors. Given the ethnic make-up of the Nation at that juncture of constitutional history, such communications were inevitably sometimes in languages other than English.

The guarantee of the freedom of speech of elected officials is so fundamental to American representative democracy that the



national legal recognition of the right predated both the Constitution and the Bill of Rights. Article V of the Articles of Confederation of 1781 provided that "[f]reedom of speech and debate in Congress shall not be impeached or questioned in any Court. . . ." Not only was this right invoked in the Confederation Congress, it was expansively interpreted to achieve its representational purpose. On June 7, 1782, David Howell, Rhode Island delegate to the second Confederation Congress, was chastised by his fellow delegates for discussing Congress's latest scheme for financing the Revolution with his constituents. *See* V *Journal of the Continental Congress,* p. 571 (1782). Refusing to budge from his unfettered right to communicate with his constituents, Howell reminded his colleagues that the right of "freedom of speech and debate" guaranteed by Article V of the Articles of Confederation, included "free communication of such speeches and debates to their constituents by the members of Congress." *Id.* Howell proceeded to observe that Congress had no power "to call any member of their body to account for information which he may think proper to communicate with his constituents. . . ." *Id.* Although Howell's colleagues continued to believe that his disclosures were counterproductive, no one (including Madison) questioned the validity of the his constitutional theory. *Id.*

When the Articles of Confederation were superseded by the new Constitution in 1789, the rights of free speech and debate were retained in Article I, Section 6 ("for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place"). Based on the understanding that these rights included the right of freedom of communications between elected officials and their constituents, as illustrated by the case of Delegate Howell above, the principle of freedom of expression was embedded in the Constitution well before the ratification of the Bill of Rights in 1791. Accordingly, James Wilson explained the purpose and scope of the speech and debate clause as follows:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness

> and success, it is indispensably necessary, that he should enjoy the *fullest* liberty of speech, and that he should be protected from the resentment of *every* one, however powerful, to whom the exercise of that liberty may occasion offense.

II *Works of James Wilson*, p. 38 (Andrews ed. 1896) (emphasis added).

Indeed, even without a textual predicate for the protection of communications between constituents and representatives, the right to engage in such communications is inherent in the very concept of representative government. *See generally* C. Black, *Structure and Relationship in Constitutional Law,* pp. 35-42 (1965). Accordingly, this right was probably applicable against state governments under Article IV, Section 4 of the Constitution ("The United States shall guarantee to every state in this Union a republican form of government"). *See generally,* A. Amar, *The Bill of Rights As A Constitution,* 100 Yale L. J. 1131, 1149 (1991).

Although the principle of freedom of speech inhered in the original constitutional structure, it found its richest textual expression in the first amendment. The amendment "obviously sounds in structure and focuses . . . on the representational linkage between Congress and its constituents." A. Amar, *The Bill of Rights as a Constitution,* 100 Yale L. J. 1131, 1147 (1991). The amendment also protects the deliberative process attendant to representative democracy. *See generally* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960). As this Court stated in *New York Times* v. *Sullivan,* 376 U.S. 254, 269 (1964):

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes by the people. The maintenance of the opportunity for free political discussion to the end that government be responsive to the will of the people and that changes may be obtained by



> lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. . . . The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selections. To many this is, and always will be, folly; but we have staked upon it our all."

(Citations and internal quotation marks omitted.) Of course, this "multitude of tongues" necessarily includes a multitude of different languages.

The application of these free speech principles to elected officials is illustrated by this Court's unanimous opinion in *Bond* v. *Floyd,* 385 U.S. 116 (1966). In *Bond* the Court considered a first amendment challenge to the Georgia House of Representatives' refusal to seat Julian Bond upon his lawful election to office based on his public criticism of the Vietnam War. In reversing the Georgia House's decision to exclude Mr. Bond, in words that echo James Wilson, the Court stated that the first amendment requires that elected officials "be given the *widest* latitude to express their views of policy" and that elected officials were entitled to as much protection under the first amendment as members of the public at large. *Id.* at 136 (Emphasis added.) This "wide latitude" necessarily includes the right to choose the linguistic means by which to communicate with constituents. This is especially true when some of those constituents — like many members of Arizonans Against Constitutional Tampering — are unable to communicate effectively in English.

Judge Brunetti eloquently summarized these essential free speech principles in his concurring opinion below:

> Article [28] offends the First Amendment not merely because it attempts to regulate ordinary speech, but because it attempts to manipulate the political process by regulating the speech of elected officials. Freedom of speech is the foundation of our democratic process, and

> the language restrictions of Article [28] stifle informative inquiry and advocacy by elected officials. By restricting the free communication of ideas between elected officials and the people they serve, Article [28] threatens the very survival of our democratic society. . . . Elected representatives cannot fully serve their constituents if they are precluded from fully expressing their views to, and learning the views of, those constituents. The First Amendment precludes an electoral majority from restricting political communications with a certain segment of the electorate.

*Yniquez* v. *Arizonans for Official English*, 69 F.3d 920, 950-951 (9th Cir. 1995) (Brunetti, J., concurring) Petitioners' Appendix, pp 62-64. This reasoning reflects this Court's settled understanding of "the central meaning of the First Amendment." *New York Times* v. *Sullivan*, 376 U.S. 254, 273 (1963).

By impeding — and in some cases eliminating altogether — communications between elected officials and their constituents, Article 28 violates the most basic elements of free speech.

### III. This Dispute Presents A Case or Controversy.[13]

Arizonans Against Constitutional Tampering ("AACT") is a unincorporated political action committee consisting of state elected officials, public school educators, state employees, and private citizens who routinely communicate in languages other than English during the performance of government business. *See* AACT's Appendix, pp. 2-4. AACT was established in 1988 to oppose the passage of Article 28 and to protect the free speech rights of its members in the event of its passage. *Id.* As discussed above, the foreign language communications in which members of AACT engage include the rendering and receipt of speech involving matters of public concern.

As petitioners' chief political adversary in the 1988 Arizona general election, AACT officially opposed the adoption of Article 28 in the official "Arizona Publicity Pamphlet" prepared

[13] AACT also joins in petitioners' arguments regarding Article III requirements.



by the Arizona Secretary of State pursuant to A.R.S § 19-123. *See* "Argument Against Proposition 106," Joint Appendix, pp. 39-40. Thus, the State of Arizona officially recognized AACT's special interest in Article 28 even prior to its adoption.

AACT's free speech interests in this litigation are so obvious and indisputable that the Attorney General of Arizona did *not* oppose AACT's successful motion to intervene as a plaintiff in this proceeding, although the Attorney General had previously suggested that respondent Yniguez lacked standing to proceed with this dispute. Indeed, AACT intervened in this matter in order to preclude the waste of private and public resources that the Attorney General's present contentions regarding standing concede but nonetheless invite. *See* AACT's Appendix, p. 3 ("To preclude any possibility of mootness in this proceeding, AACT and Mr. Espinosa move to intervene as plaintiffs-appellees in this appeal").

In *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 757 (1976), this Court recognized that the first amendment protects the right to render and receive information. *Id.*[14] The Court also concluded that the recipients of constitutionally-protected communications have Article III standing to protect their right to receive such communications. As the Court explained:

> [W]here a speaker exists, as in the case here, the protection afforded [under the first amendment] is to the communication, to its source and to its recipients both. . . . [If] there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by [the consumers here].

*Id.* This principle of standing is clearly applicable to this case.

The law at issue in *Virginia Pharmacy Board* prohibited pharmacists from advertising prescription drug prices. The law was

[14] *See also Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (recognizing the right of consumers of legal services to receive truthful advertising regarding the availability of legal services).

challenged by a group of prescription drug consumers — the "Virginia Consumer Board" — whose members desired the benefit of having price information in the marketplace. (AACT is analogous to the Virginia Consumer Board.) In invalidating the law on first amendment grounds, the Court emphasized that the public's interest would be best served by the free exchange of commercial information. This reasoning applies with even greater force in this case given the fact that Article 28 proscribes core political speech. Constituents indisputably have a greater first amendment right to receive voluntary communications from their elected representatives on matters of public concern than to receive commercial communications.[15]

Because Article 28 abridges core political speech which the members of AACT have a first amendment right to receive and impart, AACT has standing to challenge Article 28. A contrary conclusion would elevate the protection afforded commercial speech under the first amendment above the protection afforded political speech, a truly radical departure from this Court's long-standing free speech jurisprudence.

[15] *See generally* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, p. 53 (1960) ("The essential point is not that the alien has a right to speak but that we citizens have a right to hear him").



## CONCLUSION

For these reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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July 26, 1996

No. 95-974

# In the Supreme Court of the United States

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND
ROBERT D. PARK,
PETITIONERS,

*v.*

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ;
JAIME GUTIERREZ; AND ARIZONANS AGAINST
CONSTITUTIONAL TAMPERING,
RESPONDENTS.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## APPENDIX TO RESPONDENT ARIZONANS AGAINST CONSTITUTIONAL TAMPERING AND THOMAS ESPINOSA'S BRIEF IN SUPPORT OF JUDGMENT


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July 26, 1996

**No. 92-17087, 93-15061 and 93-15719 (Consolidated Appeal)**
**D.C. No. CV88-1854-PGR**

# In the United States Court of Appeals
## FOR THE NINTH CIRCUIT

MARIA-KELLEY F. YNIGUEZ: JAIME P. GUTIERREZ,
PLAINTIFFS-APPELLEES,

*v.*

STATE OF ARIZONA; ROSE MOFFORD;
ROBERT CORBON; et al.
DEFENDANTS-APPELLEES,

*v.*

ARIZONANS FOR OFFICIAL ENGLISH;
ROBERT D. PARK,
INTERVENORS-DEFENDANTS-APPELLENTS.

MARIA-KELLEY F. YNIGUEZ,
PLAINTIFFS-APPELLANT,

*v.*

STATE OF ARIZONA; ROSE MOFFORD;
ROBERT CORBIN; et al.,
DEFENDANTS-APPELLEES.

**ARIZONANS AGAINST CONSTITUTIONAL TAMPERING AND THOMAS ESPINOZA'S MOTION TO INTERVENE AS PLAINTIFFS-APPELLEES**

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July 26, 1996

Pursuant to Rule 27, Federal Rules of Appellate Procedure, and Rule 24, Federal Rules of Civil Procedure, Arizonans Against Constitutional Tampering ("AACT") and its chairperson, Thomas Espinoza, move to intervene as plaintiffs-appellees in this proceeding. This motion is supported by the following memorandum of points and authorities.

RESPECTFULLY SUBMITTED this 25th day of May, 1994.

BRYAN CAVE

By:_____

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## MEMORANDUM OF POINTS AND AUTHORITIES

Arizonans Against Constitutional Tampering ("AACT") is a political action committee which was organized in 1988 by citizens of Arizona in opposition to intervenors-appellants, Arizonas for Official English Committee. Thomas Espinoza has been a member of AACT since 1988 and has been chairperson of AACT since May 19, 1994. AACT and Mr. Espinoza campaigned against the ballot initiative officially sponsored by intervenors-appellants proposing the adoption of Article 28 to the Arizona Constitution. In the Arizona general election of November, 1988, a majority of voters participating in the election approved the adoption of Article 28 by an approximate one-half of one percent margin.

During the campaign preceeding the adoption of Article 28, an official "Arizona Publicity Pamphlet" was created by the Arizona Secretary of State and distributed pursuant to A.R.S. § 19-123. The publicity pamphlet set forth (1) the text of Article 28 (then known as Proposition 106), (2) the Legislative Council's analysis of Article 28, and (3) arguments for and against Article 28. AACT, through its former chairperson, then Arizona State Representative Armando Ruiz, submitted an "ARGUMENT 'AGAINST' PROPOSITION 106" pursuant to A.R.S. § 19-124. *See* attached Exhibit "A." Correspondingly, intervenors-appellants submitted an "ARGUMENT 'FOR' PROPOSITION 106." *See* attached Exhibit "B". Thus, intervenors-appellants and AACT and Mr. Espinoza are political counterpoints with diametrically opposed interests regarding the consitutionality of Article 28 and this appeal.

This Court has recognized intervenors-appellants' standing to intervene for purposes of appeal under both Article III of the United States Constitution and Fed. R. Civ. P. 24. *See Yniguez* v. *State of Ariz.*, 939 F.2d 727, 733 (9th Cir. 1991). Because AACT and Mr. Espinoza are intervenors-appellants' political counterpoints in connection with Article 28, AACT and Mr. Espinoza have the same interests in having Article 28 declared unconstitutional as intervenors-appellants have in



having Article 28 declared constitutional. Consequently, AACT and Mr. Espinoza have standing to intervene in this appeal for the same reasons that intervenors-appellants had standing to intervene for purposes of appeal. AACT's interests in this appeal were acknowledged by this Court in granting AACT leave to appear as *amicus curiae* and to participate in the oral argument on the merits.

Up to this juncture, plaintiff-appellee has adequately defended the preservation of the district court's judgment declaring Article 28 void. However, the State of Arizona has suggested that this appeal is "moot" because plaintiff-appellee is no longer employed by the State. *See Yniguez* v. *Arizona*, 975 F.2d 646, 647 (9th. 1992). While this Court has properly rejected the State's suggestion of mootness, *Id.*, other cases have been dismissed as moot based on the appellee's lack of government employment during the pendency of appeal and the question of mootness may arise again as this appeal progresses. *See, e.g., Gutierrez* v. *Municipal Court of the Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988), *reh'g en banc denied*, 861 F.2d 1187 (1988), *vacated as moot*, 490 U.S. 1016 (1989). Significantly, this Court has acknowledged that any potential for "mootness [in this appeal] may be avoided by the intervention of a new plaintiff whose claim against the operation of the English only provision is not moot." *Yniquez* v. *Arizona*, 975 F.2d 646, 648 (9th. 1992).

To preclude any possibility of mootness in this proceeding, AACT and Mr. Espinoza hereby move to intervene as plaintiffs-appellees in this appeal. This intervention will not prejudice intervenors-appellants any more than intervenors-appellants prejudiced plaintiff-appellee by intervening for purposes of appeal. Moreover, because AACT has already participated in this appeal as an *amicus curiae*, no further briefing will be required as a result of AACT and Mr. Espinoza's intervention as a plaintiffs-appellees.

In addition, by foreclosing the possibility of mootness of this appeal, AACT and Mr. Espinoza's proposed intervention will prevent any judicial resources being wasted as a result of

AACT and Mr. Espinoza's filing of a new action in the district court in the event that this appeal were to be dismissed as moot.

For the foregoing reasons, AACT and Thomas Espinoza's motion to intervene as plaintiffs-appellees should be granted.

RESPECTFULLY SUBMITTED this 25th day of May, 1994.

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ORIGINAL and four copies of the foregoing Motion sent by overnight delivery this 25th day of May, 1994, to:

Ms. Cathy A. Catterson
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Supreme Court, U.S.
FILED
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CLERK

No. 95-974

In The

# Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH
and ROBERT D. PARK,

*Petitioners,*

v.

STATE OF ARIZONA; MARIA-KELLY F. YNIGUEZ;
JAIME GUTIERREZ; and ARIZONANS AGAINST
CONSTITUTIONAL TAMPERING,

*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## RESPONDENTS' REPLY BRIEF IN OPPOSITION TO THE JUDGMENT

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The State filed its Brief in Opposition to the Judgment several weeks before the other Respondents so they would have the opportunity to respond to the State's argument that there is no live case or controversy with respect to Respondent Yniguez. This Reply Brief addresses only Respondent Yniguez's response to the State's argument, since she is the only Respondent who addressed this issue. *Cf. Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990) (the Federal Energy Regulatory Commission did not petition the Court for certiorari but filed as a respondent in support of the petitioners and filed a reply brief).

## I. There Is No Case or Controversy with Respect to Respondent Yniguez.

Respondent Yniguez fails to address the Court's question and the State's position that no case or controversy ever existed between Governor Mofford and Yniguez because the Governor never threatened to enforce Article XXVIII of the Arizona Constitution against her. Yniguez's assertion that the State did not address whether a case or controversy exists with respect to her, Brief for Respondent Maria-Kelly Yniguez (Yniguez's Brief) at 20, is simply wrong. *See* State's Brief in Opposition to the Judgment at 15-16. Yniguez's brief ignores this case or controversy argument and addresses only mootness. Yniguez thus fails to demonstrate to this Court how her lawsuit has ever satisfied Article III of the Constitution. Yniguez's failure to demonstrate actual injury is fatal to her ability to maintain her case and should result in dismissal of the appeal and vacatur of

the lower court decisions. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *see also Lewis v. Casey*, 116 S. Ct. 2174, 2179 (1996) ("It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The district court specifically stated that "there is no evidence of record to establish that Yniguez's asserted injury is anything except purely conjectural and hypothetical." Pet. App. 103a. Yniguez does not dispute this point. Therefore, there never was a case or controversy before the federal courts.

Although Yniguez addresses the mootness issue, she argues that mootness is not encompassed within the question raised by the Court concerning whether a case or controversy exists with respect to Yniguez. Yniguez's Brief at 20. Again, Yniguez is simply wrong. "The inability of the federal judiciary 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' " *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (per curiam) (quoting *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1974)). Thus, if Yniguez's claims are moot, a case or controversy does not exist. *See De Funis*, 416 U.S. at 317 (" 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them' ") (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).



Yniguez effectively concedes[1] mootness by acknowledging that she must prevail on her nominal damage theory to satisfy Article III. Yniguez's summary response that her concocted, post-hoc nominal damage claim preserves the Ninth Circuit's jurisdiction over the case, after she voluntarily quit her job, fails to demonstrate the viability of her nominal damage claim. First, Yniguez claims in circular fashion that she suffered a compensable injury because "the injury [she] suffered was of a type this Court has held entitles her to an award of nominal damages." Yniguez's Brief at 21. This is supported solely by a reference to a portion of the Court's decision in *Carey v. Piphus*, 435 U.S. 247, 266 (1978), in which the Court merely describes certain holdings of "common-law courts" that are not directly relevant here. In *Carey*, the plaintiff had been suspended from school without the benefit of any type of hearing in unquestioned violation of the Due Process Clause. This case is fundamentally different from *Carey* because there was no enforcement of Article XXVIII against Yniguez and thus, no deprivation of a right. Yniguez merely responded to the new state law by going to court and asserting her rights in a vacuum.

Yniguez does not distinguish between a threatened violation of a First Amendment right, which may be sufficient to allow the individual to challenge the statute facially, and the independent requirement that there be an actual deprivation of a protected right in order to justify even nominal damages. *See Carey*, 435 U.S. at 267. The district court recognized this distinction and "found no

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[1] Yniguez does not defend her ability to seek declaratory relief. *See* Yniguez's Brief at 21-22.

evidence of record to establish that Yniguez's asserted injury is anything except purely conjectural and hypothetical. . . . " Pet. App. 103a. Whatever the merit of permitting Yniguez to pursue a claim for declaratory relief, which she now concedes is moot, there never was any basis for allowing her to seek damages of any sort based on her showing below. This is almost certainly why she never sought damages until after the mootness issue became a serious concern to her.

Second, the suggestion that the Governor was amenable to suit under *Ex parte Young*, 209 U.S. 123 (1908), and therefore is liable in damages is utterly inconsistent with the fiction that is the essence of *Ex parte Young*. That doctrine provides a mechanism by which individuals can, without running afoul of the Eleventh Amendment, enjoin States from violating the Constitution, and the holding is expressly predicated on the assumption that the State's fisc will not be jeopardized by such injunctions. *See, e.g.*, Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 2.12, at 145 (2d ed. 1992). Obviously, a holding that a state official, by being subject to injunctive relief under *Ex parte Young*, is thereby exposed or exposes the State to liability for damages runs completely afoul of this understanding. It is clear that the claim in this case is solely a challenge to Article XXVIII and as such is not a proper basis for imposing personal liability against an individual official. *See Edelman v. Jordan*, 415 U.S. 651 (1974).[2]

---

[2] Respondent Yniguez does not address the separate problem that 42 U.S.C. § 1983 does not permit an award of damages to be entered against Mofford. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Thus, even if *Ex parte Young* meant that the Eleventh Amendment is no bar, there is still the problem of how to obtain federal jurisdiction when the underlying claim is conclusively barred by a prior decision of this Court. Yniguez's silence on this issue supports the conclusion that this lawsuit is moot.



Third, there is no merit to Yniguez's claim that *Alejandrino v. Quezon*, 271 U.S. 528 (1926), can be distinguished. The flaw in that case is precisely the flaw in this case. The issue of seeking damages arose only as an afterthought and thus was "incidental" to the underlying claim, which had become moot. The Court's approach in *Alejandrino*, if followed here, would recognize the essential nature of Yniguez's claim and decline to entertain the damage claim that has never been developed and, by itself, raises a number of thorny legal issues. Accordingly, *Alejandrino* is clear authority in support of resolving this case solely on the ground that the declaratory judgment claim is unquestionably moot.

Finally, Yniguez's brief raises another fundamental flaw with her nominal damage claim. Yniguez asserts that Arizonans for Official English (AOE) did not have standing to appeal the district court's decision but that the Ninth Circuit had jurisdiction over the appeal nonetheless because the State was permitted to intervene pursuant to 28 U.S.C. § 2403(b).[3] The court of appeals did not

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[3] Yniguez also argues that pursuant to 28 U.S.C. § 2403(b), the State is restricted to arguing constitutionality. Yniguez's Brief at 20 n.6. The State is not precluded from advising the Court on the jurisdictional issues raised by the Court's questions to the parties. These fundamental questions concerning the federal courts' power to consider this case are properly raised by the Court, *sua sponte*, *see United States v. Hays*,

have jurisdiction, however, because Yniguez's declaratory judgment claim was undisputedly moot when the court of appeals considered and then affirmed the district court's denial of the State's motion to intervene, thus barring the State from appealing the district court's judgment as a party. J.A. 179-83. Thus, even if the court of appeals had permitted the State to intervene as a party, the court would not have had jurisdiction over the appeal because Yniguez's claim was moot. Yniguez could not salvage her claim from being moot by belatedly claiming that the district court erroneously failed to award her nominal damages because she did not cross-appeal such a failure until more than two years after the State filed its original notice of appeal. Unlike AOE, which was permitted to intervene as a party, the State did not file a second notice of appeal. Thus, Yniquez's cross-appeal of the district court's failure to award nominal damages was invalid because there was no valid[4] or live appeal from which to cross-appeal.

In sum, Yniguez has failed to demonstrate that an actual controversy ever existed or that a controversy continued to exist after she left state employment and that the lower courts properly exercised jurisdiction over her complaint. Consequently, her case should be dismissed and the lower court decisions vacated. *See DeFunis*, 416 U.S. at 319-20 (quoting *Roe v. Wade*, 410 U.S. 113, 125

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115 S. Ct. 2431 (1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990)), and the State, as a party, is entitled to address the questions.

[4] AOE's appeal was invalid because AOE lacked standing to appeal the district court's decision.



(1973)) (" 'The usual rule in federal cases [is] that an actual controversy must exist at all stages of appellate or certiorari review and not simply at the date the action is initiated.' ").

## II. This Court Should Vacate the Lower Court Decisions.

Yniguez argues that vacatur is unwarranted because the Governor decided not to appeal the district court decision. Yniguez's Brief at 23-25. The determination whether vacatur is warranted in a particular case, however, is based on a thorough consideration of the totality of the circumstances. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391-92 (1994). Here, the Governor's personal choice not to appeal cannot fairly be imputed to the State as a whole. The Attorney General sought to intervene in order to appeal the decision and should have been permitted to intervene. Yniguez does not dispute this. *See* Yniguez's Brief at 32 n.10 and accompanying text. The State acted reasonably under the circumstances and certainly did nothing to justify forfeiting a claim to vacatur.

Moreover, Yniguez blithely ignores her own role in creating the mootness problem. She voluntarily mooted this dispute by leaving her employment and failed to notify the court of appeals of this fact. Thus, the State was required to file a Suggestion of Mootness. A rule that permits a plaintiff to obtain a favorable judgment and then avoid appellate review by voluntarily mooting the dispute is hardly equitable. The lack of fairness in such a procedure is the basis of the *Munsingwear* doctrine, which

Yniguez completely ignores. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). On this basis, the Court is justified in vacating the court of appeals decision and ordering the district court to dismiss the complaint.

Yniguez also argues that the court of appeals had jurisdiction over the appeal and that therefore its decision should not be vacated. Yniguez bases her argument concerning the Ninth Circuit's jurisdiction on the State's appeal pursuant to 28 U.S.C. § 2403(b). Yniguez's Brief at 20 n.6 and accompanying text. This argument is flawed for two reasons. First, the court of appeals specifically held that the State was not permitted to intervene as a party and that the State's right to argue constitutionality was dependent on AOE's appeal. J.A. 182-83. Therefore, the State did not file a notice of appeal after the Ninth Circuit's intervention decision. Second, even if the State had been a party, the State's presence as a party could not cure Yniguez's mootness problem, which divested the Ninth Circuit of jurisdiction over her declaratory judgment claim. And, unless AOE was a permissible appellant in the court of appeals,[5] Yniguez could not cure her mootness by cross-appealing the district court's failure to award nominal damages because she failed to file a cross-appeal after the State filed its only notice of appeal.

This Court should vacate the Ninth Circuit decision and the complaint should be dismissed. At a minimum, this Court should vacate the Ninth Circuit decision because that court lacked jurisdiction over the appeal. *Cf.*

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[5] Yniguez acknowledges that AOE did not have standing to appeal the district court's decision. Yniguez's Brief at 10-18.



*Karcher v. May*, 484 U.S. 72, 83 (1987) (refusing to vacate because the lower courts had Article III jurisdiction). It is inequitable to allow the court of appeals' decision, which binds AOE as a party, to stand and then to prohibit AOE from appealing.[6]

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[6] Respondent Yniguez distorts the record to make the State's circumstance appear less equitable than it is. First, she treats the district court's judgment declaring Yniguez's rights as synonymous with a judgment for nominal damages. They are not the same. The district court never entertained any nominal damages claim and only entered the nominal damage judgment pursuant to the mandate of the court of appeals following the en banc decision. There was insufficient basis for the State to obtain a stay of the mandate.

Moreover, the State did not forego any rights before this Court. Petitioners challenged the judgment below and named the State as a respondent before this Court. And, in responding to this Court's order directing the parties to address the Court's jurisdictional questions, the State has acted appropriately.

## CONCLUSION

For the reasons stated above and those stated in the State's Brief in Opposition to the Judgment, the judgment of the court of appeals should be vacated and the case remanded for entry of dismissal of the complaint.

Respectfully submitted,

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In The
# Supreme Court of the United States
October Term 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

# REPLY BRIEF FOR PETITIONERS

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## INTRODUCTION

In 1976, this Court said that a government may require a police officer to salute the flag while in uniform. *Kelley v. Johnson*, 425 U.S. 238, 245-46 (1976). In 1996, Respondents and amici suggest that a government may not require the same police officer to speak English on the job.[1]

In 500 pages of coordinated briefing by Respondents and amici, perhaps what is most telling is not the errors, distortions and misconceptions, but what is not said. There are no references to Judge Fernandez's or any other dissent. There are no references to government's rights to set policy and few references to government's rights to speak or promote a particular policy. There is no recognition of the nondiscriminatory purposes and substantial state interests enunciated in recent congressional consideration of Official English[2] legislation.

There is no recognition that government programs to preserve languages and cultures are policy choices, not constitutional mandates, and certainly no mention of the numerous governmental failures in providing language

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[1]Nor are police the only uniformed government employees affected by this case: on August 1, 1996, the United States House of Representatives considered an amendment to prohibit the government from assigning combat duty to members of the armed forces who don't speak English. H.Rep. 104-734, 104th Cong. 2d Sess., 3-4 (1996) (Amendment by Rep. Serrano); CONG. REC. (daily ed.) Aug. 1, 1996, H9730 (Remarks of Del. Romero-Barceló)("And how many of those soldiers that were defending the Nation died because maybe they did not understand the orders?").

[2]Article XXVIII is an "Official English" provision, not an "English-only" law. Article XXVIII affects only government speech, and not even all government speech. It applies only to actions which bind the government. CONG. REC. (daily ed.) Aug. 1, 1996, H9763 (Remarks of Rep. Seastrand). In contrast, "an English-only bill . . . would apply not only to the Government but to private businesses, churches, neighborhoods, and homes." *Id.*, H9766 (Remarks of Rep. Cunningham).

"assistance." And the historical analyses offered by Respondents and amici never mention that every decision to use a language other than English has been a considered choice by government, not a mandate from the First Amendment.

The lower court decisions, which similarly ignore all of these points, should be reversed.

## I. Respondents and Amici Ignore Both the Government Speech Doctrine and the Rights of the State to Set Policy.

"Kelly Yniguez just wanted to do her job." Brief for Respondent Maria-Kelly F. Yniguez ("Yniguez Opp."), 1. Her job was to protect the public fisc by settling malpractice claims of up to $10,000. J.A. 84.

But how would Arizona know if she **was** doing her job, since her supervisors and auditors could not read the settlement releases she was writing? J.A. 88. Trust me, she suggested. J.A. 87-88. Trust, but verify, responded the State. J.A. 88.

If Yniguez had said at her job interview, "I'll decide for myself which State policies I'll obey," she would not have been hired. The situation was no different once Yniguez got the job. She has "no special constitutional right to a voice in the making of policy by [her] government employer." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285-86 (1984); *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-66 (1979)(same); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 n. 4 (1990)(that government uses public employment to further its interests in the structure and functioning of society as a whole does not render those interests employment-related).

No reference to these cases can be found in Respondents' and amici's briefs. Yet these briefs ask for the power to set or ignore State policy, based solely on public employees' rights, rights of claimants for government services, and a perceived need to preserve languages and cultures.



Similarly, only passing references can be found to the "government speech" cases, such as *Rosenberger v. Rector and Visitors of Univ. of Virginia*, __ U.S. __, 115 S.Ct. 2510, 2518-19 (1995)(state may regulate the content of expression when it is the speaker), *Capital Square Review & Advisory Bd v. Pinette*, __ U.S. __, 115 S.Ct. 2440, 2449 (1995)(government runs no risk of suppressing free speech when it restrains its own speech), and *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974)(city may restrict signs on city buses to avoid "lurking doubts about favoritism").[3] Under Respondents' and amici's interpretation, for example, government **does** run a risk of suppressing free speech when it chooses to speak in English. Yet *Capital Square* is not mentioned.

It is as if the State has no right to control its own expression, and, as shown in Petitioners' Opening Brief on the merits, Pp. 20-32, that position is contrary to this Court's decisions. "The fault lies in the rule's central premise – the dangerous notion that government employees have a personal stake in the words they utter when they speak for the government." Appendix to Petition for Certiorari ("App."), 89a (Kozinski, J., dissenting). The lower court's decision must be reversed.

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[3] *See also*, Transcript of argument in *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, No. 94-1654, Nov. 28, 1995:

QUESTION: The Government cannot possibly use its authority, its contracting authority to foster any policies or ideas that it thinks are desirable?

MS. BRINKMANN [for the United States]: If the contract is to communicate the Government's speech, certainly. Pp. 52-53.

MS. BRINKMANN: [O]ne of the differences in the Government interests between the employee situation and the contractor situation is whether the speaker's speech is attributed to the Government. *Id.*, 54.

## II. This Is A Policy Debate About How Government Should Respond to the Needs of Immigrants and Society.

Respondents and amici claim that Official English statutes are divisive and discriminatory, serve no legitimate government interests and are predicated on fear of immigrants. In fact, Article XXVIII, like all modern Official English enactments, is predicated on a belief that recent **government** language policies hurt immigrants and American society alike.

### A. Official English Statutes Protect Important Non-Discriminatory State Interests.

A recent congressional debate demonstrates both the nondiscriminatory purpose of Official English enactments and the vital state interests they serve.[4] On August 1, 1996, the U.S. House of Representatives passed H.R. 123, the Bill Emerson English Language Empowerment Act of 1996, by a vote of 259-169. CONG. REC. (daily ed.), Aug. 1, 1996, H9771-72. Rep. Linder, floor manager for the Rule which crafted H.R. 123 from disparate legislation,[5] summed up the basic rationale:

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[4]CONG. REC. (daily ed.) Aug. 1, 1996, Pp. H9725-H9772, H9726 (Remarks of Rep. Linder: "Mr. Speaker, the English Language Empowerment Act of 1996 is designed to empower a new generation of immigrants. . . This bill assures that we have a uniform government policy that does not undercut incentives to learn English and is consistent with established immigration policy."), H9731 (Remarks of Rep. Solomon: "[I]f the Government does not remove the impediments to assuring that these immigrants receive the keys to opportunity here, then I am afraid they will remain in what the New York Times called a bilingual prison."), H9736 (Remarks of Rep. Kingston, speaking in English, French, Italian and Japanese: "Nations need a common language ").

[5]The bill, as passed by the House, combined the late Rep. Emerson's Language of Government Act, declaring English the official language of the federal government, with the Bilingual Voting Requirements Repeal Act of 1996, H.R. 351, which would repeal the federal mandate for multilingual

(continued...)



> For over 200 years, the glue that held the fabric of this society together was a common language. Thirty years ago, we began to change that. We began to deal with people in different languages. That isolated them. This bill is going to bring them back together. The isolation that was created by putting people in pockets of communities that spoke a different language kept them apart and out of the American dream. This is a modest effort to change that.

CONG. REC. (daily ed.) Aug. 1, 1996, H9737.

Rep. Solomon, Chairman of the Rules Committee, agreed: "[T]he current situation has trapped 1.5 million immigrants in poverty. . . This bill places the Federal government in the affirmative position of saying this tragedy is not going to continue." CONG. REC. (daily ed.) Aug. 1, 1996, H9731.

Rep. Livingston, Chairman of the Appropriations Committee, said:

> Opponents of making English the official language claim that certain ethnic groups do not understand English and therefore must be accommodated. . . . In 1995 alone, the Federal Government spent over $200 million on such programs. And, when you include State and local mandated spending for such programs, the amount skyrockets to $8 billion.
>
> Well, Mr. Speaker, something is obviously not working. It is becoming more and more evident that teaching children in their native, foreign language hinders their ability to learn English. Printing ballots in foreign languages does the same. Let's not perpetuate an already bad problem by officially recognizing languages other than English.

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(...continued)
voting materials. *See*, H. Rep. Nos. 104-723 and 104-728, 104th Cong., 2d Sess., (1996).

CONG. REC. (daily ed.) Aug. 1, 1996, H9734.[6]

These sentiments are the same as those expressed by proponents of Article XXVIII. J.A. 28-33. They are similar to those expressed by others.[7] They amply demonstrate that

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[6]*See, also*, the remarks of Rep. Stephen Horn, long-time (1969-82) member of the United States Commission on Civil Rights:

> Ethnic groups in this country are not limited to Chinese, not limited to Hispanics, which was the original *Lau v. Nichols* case in California. In the 1970 Census there were 96 mother tongues where languages other than English were primary languages in households where many of our fellow citizens were raised; 1980, 387 non-English language possibilities. In the Los Angeles-Long Beach schools there are 70 languages. We cannot pick just one or two languages if we are really going to have equal protection of the laws.
>
> * * * *
>
> What such a policy would stop is the illusion that for every language group in a nation, a government agent must be employed or some form of government assistance must be made available to aid all members who understand English less well than their native language.

CONG. REC. (daily ed.) Aug. 1, 1996, H9766.

[7]Prof. Schlesinger writes: "Bilingualism shuts doors. It nourishes self-ghettoization and ghettoization nourishes racial antagonism." Arthur M. Schlesinger, Jr., *The Disuniting of* America, 108 (1992). The *New York Times* called bilingual education "a system that dragoons children into bilingual programs that reinforce the students' dependency on their native language and then makes escape impossible." "Bilingual Prison," *The New York Times*, September 21, 1995, at A22. The *Wall Street Journal* says "extensive bilingual ed[ucation] is extensive discrimination." "More Discrimination," *The Wall Street Journal*, February 13, 1996, A14, Col. 2. The New York City Board of Education recently concluded that new immigrants instructed in English alone performed better than students in bilingual education programs where comparatively little English is spoken. Board of Education of the City of New York, *Educational Progress of Students in Bilingual and ESL Programs: A Longitudinal Study, 1990-1994*, October 1994, ii.

The California Teachers' Association, formerly a strong advocate of bilingual education, now criticizes bilingual education for "crippling the Spanish-speaking child's educational development." *CTA Action*, May

(continued...)



Official English enactments are intended to promote non-discriminatory state interests of substantial importance to the government, such as fairness, equal treatment, adequacy of education, ameliorating poverty, self-sufficiency for all citizens, and promotion of national unity. The lower court decision, which recognized no such interests, App. 45a-56a, should be reversed.

**B. The Methods to Promote These State Interests Are Policy Choices, Not Constitutional Mandates.**

Government language choices, like all policy choices, should be made on the best information available, and corrected if subsequently shown to be mistaken. Bilingual ballots are a good example.

In 1975, Congress made findings about problems in voting by persons of limited English proficiency. 42 U.S.C. § 1973b(f)(1) (1994). The evidence supporting those findings was, in the words of then-Assistant Attorney General J. Stanley Pottinger, "not compelling." H. Rep. 104-728, 104th Cong., 2d Sess., 4 (1996).

Nevertheless, those findings were used to justify an extensive federal mandate that state and local governments provide multilingual voting materials. 42 U.S.C. §§ 1973aa-1a and (b)(f) (1994). The federal mandate was expensive and ineffective. The Congressional Budget Office estimated that the mandate cost state and local governments $5-10 million a year. H. Rep. 104-728, 104th Cong., 2d Sess., 10 (1996). One California county registrar spent $46,204 printing multilingual materials for the 1994 and 1996 elections, although only one person had used the materials in sixteen years. *Id.*, 7.

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[7](...continued)
1995. In November 1995, the California Board of Education abandoned California's traditional preference for bilingual education programs. CONG. REC. (daily ed.) December 5, 1995, H13932. *See also*, Amicus Brief of the Equal Opportunity Foundation in Support of Petition for Certiorari, Pp. 1-3.

More important, however, the Census Bureau's Current Population Surveys demonstrate that twenty years' of multilingual ballot materials have not boosted voting participation by members of minority language groups. Hispanic voting registration and participation markedly **decreased** between 1972 and 1992. *Id.*, 6. This ineffectiveness contrasts sharply with the success of other provisions of the Voting Rights Act in increasing voting registration and participation of African-Americans. *Id.*

The House Judiciary Committee reported: "[I]t is clear that the findings made in 1975 are no longer an accurate reflection of reality." *Id.*, 7. Therefore, the House voted three times to remove the federal mandate to provide multilingual voting materials. CONG. REC. (daily ed.) August 1, 1996, H9769, H9771, H9772.

One governmental policy, especially one which mounting evidence indicates has harmful effects, should not be frozen into place under the First Amendment. While the government may go far to remedy past harms, the First Amendment cannot be used to inflict harm in the service of "political correctness." *Hurley v. Irish-American Gay Group of Boston*, __ U.S. __, 115 S.Ct. 2338, 2350 (1995).

Yet that is what Respondents and amici are suggesting. No matter how narrowly they frame their request, they are seeking constitutional protection for a particular language choice which governments are rejecting as costly, ineffective and harmful to immigrants, children and society. The lower court decision, which prohibits governments from halting harmful activities, should be reversed.

### C. Respondents and Amici Seek Unwarranted Constitutional Mandates to Maintain Languages and Cultures.

Respondents and amici apparently believe Government may choose to promote one or more languages; they just disagree



with Arizona's choice of using English. Not all immigrants or members of ethnic groups support Respondents' and amici's views.

The late Sen. S.I. Hayakawa, for example, an immigrant and reknowned semanticist, was the founder of the modern Official English movement and promoted passage of Article XXVIII. Linda Chavez, *Out of the Barrio*, 88 (1991). Chavez herself was a national leader of Hayakawa's organization. *Id.* And public opinion polls indicate that language minority groups support English as the official language. Frank Viviano, "Poll Contradicts Stereotypes," *San Francisco Chronicle*, March 28, 1990, A1 ("Among the poll's surprising findings are that Asians and Hispanics overwhelmingly favor making English the official language of California.").

Ernesto Ortiz, a ranch foreman in Texas, has said: "My children learn Spanish in school so they can grow up to be busboys and waiters. I teach them English at home so they can become lawyers and doctors." CONG. REC. (daily ed.) Aug. 1, 1996, H9762 (Remarks of Rep. Knollenberg). In New York City, Hispanic parents sued to free their children from bilingual education programs; their claim was denied because bilingual education decisions are left to the Commissioner. *The Bushwick Parents Organization v. Richard P. Mills, Cmsnr of Education of the State of New York*, S. Ct. Albany County, N.Y., (January 12, 1996) Decision and Order Index No. 5181-95, RJI No. 0195ST6061 (Teresi, J.), Slip Op. 5. Indeed, in a recent poll, 81% of Hispanic parents rejected bilingual education for their children; only 12% supported it. Equal Opportunity Foundation, *Hispanic Parents Study*, August 20, 1996, P. 49.

Respondents' and amici's concerns do not identify a **constitutional requirement** that government funds be used to preserve these cultures and languages. All parties agree that a government has the power to preserve languages and cultures. *See, e.g.*, Native American Languages Act of 1990, 25 U.S.C. § 2901, *et seq.* (1992). If a government has the power to enact

such legislation, it must have the power to preserve English as well.

This is not an area in which the Constitution[8] mandates only one result. As the Ninth Circuit said prior to the decision below: "We hold, therefore, that the Constitution neither requires nor prohibits the bilingual and bicultural education sought by the appellants. Such matters are for the people to decide." *Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978).

The *Guadalupe* holding was "disapproved" by the decision below. Pet. App. 54a n. 31 ("This court's position regarding linguistic and cultural diversity and the constitutionally-permissible means for promotion of our growth as a unified nation are the ones expressed in this majority opinion."). The lower court decision, which forbids a method of preserving English accepted by 23 states, should be reversed.

### D. Official English Statutes Do Not Affect Individuals' Speech, Only Government Speech.

One of the threshold steps in any First Amendment analysis is to determine **who is speaking**. Respondents and amici claim that Article XXVIII will regulate private, legislators' or candidates' speech. The key question, however, is whether it is the **government** or an individual speaking.

Official government action is binding on the government. CONG. REC. (daily ed.) Aug. 1, 1996, H9763 (Remarks of Rep. Seastrand). Unofficial action is not binding on the government. *Id.* "This is just good common sense. It is what we would all expect for an official English bill." *Id.*, H9764. And it is what

[8]Even if there were some constitutional mandate to preserve languages and cultures, it is not likely to come from the First Amendment. "The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds." *Holland v. Illinois*, 493 U.S. 474, 488 (1990).



Petitioners have always maintained. Pet. App. 14a n. 12; Reply App. a8.

Private citizens and candidates cannot bind the government. Even legislators cannot separately speak for the government. Individual government employees speaking privately or informally cannot bind the government. No cause of action arises if a judge says "Mazel Tov" at a wedding, Pet. App. 23a, and the marriage doesn't work out.

If Article XXVIII only affects official acts of government, there is **no effect** on individuals,' legislators' or government employees' private or informal, nonbinding speech. Article XXVIII doesn't cover informal, non-binding "acts" of government, if there are any.

This interpretation, which obviates constitutional concerns and reflects the proponents' true intent, was rejected by the lower courts. Pet. App. 14a n. 12. The lower court decision, which ignores the court's obligation to find a constitutional interpretation if one exists, *United States v. X-Citement Video*, __ U.S. __, 115 S.Ct. 464, 467 (1994), should be reversed.

## III. Neither Historical Nor International Examples Suggest Official English Enactments Violate the First Amendment.

Respondents and amici suggest that historical and international evidence indicates that Official English statutes are harmful. Their examples are neither complete nor accurate.

### A. The Founders Would Not Have Permitted Unfettered Government Employee Language Choice.

Respondents and amici suggest that American history indicates that government employees and claimants for services have a right to demand multilingual government speech and services. As Petitioners showed in their Reply to Opposition to Petition for Certiorari, 6-8, such a suggestion would be contrary to the Founders' basic beliefs.

Respondents and amici suggest, for example, that the presence of large numbers of German speakers in Revolutionary-era Pennsylvania fostered a desire among the Founders to accommodate the German language in government. Yet Congress, led by Frederick Augustus Muhlenberg, a German-American from Pennsylvania, repeatedly voted **not** to provide its material in German. Amicus Brief of the Washington Legal Foundation, *et al.*, 11-13. More directly, on June 19, 1789, Benjamin Rush wrote:

> In a state where all legal proceedings as well as commerce are carried on in English, a knowledge of it must be of the utmost consequence for the preservation of property. If our Germans expected at a future day to establish their language in Pennsylvania, they never can expect to see it established in our federal councils, where they must prepare to be called to assist in the government of the United States. The English language will be absolutely necessary to qualify them for usefulness in our great national legislature.

Benj. Rush, *Letters*, (L.H. Butterfield ed.) 1:421 (1951).

**B. An Official Language Policy Can Enhance, Not Undermine, National Unity.**

Similarly, Respondents and amici suggest that the experience of other countries indicates that official language policies are divisive and ineffective. Their suggestions are incomplete and inaccurate.

Several amici, for example, claim that official language policies harm national unity. The evidence from overseas refutes that concern. Half the world's nations have official or designated national languages. Albert P. Blaustein and Dana Blaustein Epstein, *Resolving Language Conflicts: A Study of the World's Constitutions*, 1986. A recent article on the world's most populous country – China – credits its uniform language for several centuries of relative unity despite enormous



diversity. "The Great Chinese Puzzle: Empire of Uniformity," *Discover*, March 1996, at 76, 78. Similarly, Israel's firm language policy is credited by some with helping to insure national unity in a population constantly swollen by large numbers of immigrants. CONG. REC. (daily ed.) Aug. 1, 1996, H9751 (Remarks of Rep. Cox).

In contrast, official multilingualism is no guarantor of national unity. Only Canada officially recognizes two languages as "equally authoritative." Blaustein and Epstein, *supra*, 22. Yet, in October 1995, voters in French-speaking Quebec voted by less than one per cent to remain a part of Canada. Anne Swardson & Charles Trueheart, "Canadian Leader Offers Concessions to Quebec," *The Washington Post*, November 28, 1995, A1, col. 2. The *Parti Quebecois*, now controlling the province, may continue to move toward separation from Canada. *Id.*, A13, col 1.

## IV. PETITIONERS HAVE STANDING TO REMEDY THE DIRECT AND IMMEDIATE HARM CAUSED TO THEM BY THE DECISION BELOW.

**A. The State Has Not "Acquiesced" In the Lower Court Decision.**

Respondents and amici suggest that Petitioners do not have standing because the **State** has "acquiesced" in the decision below. This suggestion is incorrect.

Although the Governor may have decided not to appeal, the Governor is not the State; the Arizona Attorney General, in contrast, is actively litigating in support of Article XXVIII on behalf of the State. Brief for [State] Respondents In Opposition to the Judgment ("State Resp. Br."), 36 ("The judgment of the court of appeals should be vacated and the case remanded for entry of dismissal of the Complaint.").

The State has standing to challenge the lower court decisions. *Maine v. Taylor*, 477 U.S. 131, 136 (1977). It is doing so, through the Attorney General. Now that the State has

– made its position plain, this case is no different from *U.S. Term Limits v. Thornton*, __ U.S. __, 115 S.Ct. 1842 (1995) and others in which initiative proponents were parties.

The fact that the State and Petitioners have different positions is no bar to standing.[9] Intervenors are entitled to present their strongest arguments and have all issues adjudicated. *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 766 (1989); Transcript of Argument in *U.S. Term Limits v. Thornton*, Nos. 93-1456, 93-1828, Nov. 29, 1994, 9 (QUESTION: Mr. Kester, do you adopt the same argument as your predecessor [Arkansas Attorney General] here . . . ? MR. KESTER: No, not precisely, Justice O'Connor.); *Alexander v. Hoffman*, 296 U.S. 222 (1935).

Thus, standing challenges predicated on the State having "acquiesced" in the lower court's judgment are incorrect. The validity of the lower court decision is properly at issue.

**B. Petitioners Have Suffered Immediate and Direct Injury from the Decision Below.**

Another claim is that Petitioners have suffered no cognizable injury because they can continue to sue in state court. This assertion is also incorrect. Petitioners participated in this case and so are bound by its constitutional adjudication. *Richards v. Jefferson County, Alabama*, __ U.S. __, 116 S.Ct. 1761, 1766 (1996); *Adams v. Morton*, 581 F.2d 1314, 1318 (9th Cir. 1978).

Prior to the decisions below, Petitioners had rights to sue in state court under Article XXVIII, § 4. Now those rights are lost. As the State acknowledges, "If the Court does not vacate the Ninth Circuit decision, however, AOE's members are foreclosed from filing suit to enforce Article XXVIII under

[9]The State's position below on the merits was the same as Petitioners'. Brief of State of Arizona and State Officers, 1-14, 12 n. 4, 13 n. 5. (State concurs in Petitioners' First Amendment arguments). *Spence v. Washington*, 418 U.S. 405, 411 (1974)(when counsel changed State's position, Court looked at all arguments).



section four." State Resp. Br. 31, n. 9. Thus, Petitioners have no state court rights under Article XXVIII – solely as a result of the lower court decision.

In addition, Petitioners have suffered direct and immediate harm as a result of the adoption by the Arizona courts of the decision of the Ninth Circuit in this case. On June 11, 1996, the Arizona Court of Appeals decided *Ruiz v. Arizonans for Official English*, No. 1 CA-CV 94-0235, amended August 1, 1996, *reprinted in* Reply App.[10] "In these circumstances, we conclude that it is appropriate for us to exercise our discretion and defer to [this] federal litigation and thereby accept the construction of Article 28 and the analysis that was set forth by the Ninth Circuit." Reply App. a9.

As in *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 618 (1989), "as a result of the state court judgment, the case has taken on such definite shape that Petitioners are under a defined and specific legal obligation, one which causes them direct injury." Valuable legal rights – including the rights to sue and to political speech, *see* Petitioners' Opening Brief on the merits, 40-47, will be harmed to a specific and substantial degree by the judicial conclusion in this case. *Id.*, 490 U.S. at 619.

Petitioners have already tried to exercise their rights; those rights were negated by the decision below. Thus their injury is neither hypothetical nor speculative. *Whitmore v. Arkansas*, 495 U.S. 149, 156-60 (1990). It is incorrect to claim that only the State suffers an injury from the lower court decision,[11] Amicus Brief of the United States, 7, or that the judgment in

[10]*Ruiz* was a state court challenge to Article XXVIII. Pet. App. 20a (State court did not "narrow" Art. XXVIII).

[11]These statements are also incorrect because other courts are using the decisions below to expand the First Amendment. For example, in *Bernstein v. United States Dept. of State*, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996), Judge Marilyn Hall Patel, relying on the lower court decision here, held that computer software programs are protected speech, even if they are produced and received solely by computers ("object code").

this case does not interfere with Petitioners' right to enforce Article XXVIII in state court. *Id.*, 9. Petitioners have a cognizable injury caused specifically by the lower court decision which could be redressed by the relief sought here. Petitioners have standing.

### C. Respondents and Amici Misconstrue the Rights Arizona's Constitution Gives Its People.

In their Opening Brief on the merits, 41-43, Petitioners explained how the people of Arizona have legislative rights under the Arizona Constitution which deserve representation when the Governor refuses to protect them. Respondents and amici incorrectly contend that the people's only recourse is to "throw the rascals out."

In the ordinary course, "disagreement with public policy and disapproval of officials' responsiveness . . . is to be registered principally at the polls." *Minnesota*, 465 U.S. at 286. From this, Amicus United States suggests that the remedy for state officials' failure to appeal an adverse decision is recall by the voters. Amicus Brief of the United States, 24.

But the United States' own analysis suggests a less cumbersome and more direct approach, which accords more respect to the Arizona Constitution. The question of who can appeal on behalf of the State, opines the United States, "depends on how the State allocates power among its branches of government." *Id.*, 16. In States which adhere to the federal model of separation of powers, the United States suggests, a specific state law must give Petitioners standing to appeal, and Article XXVIII, § 4 is inadequate to the task. *Id.*

Yet Arizona does **not** follow the federal model of separation of powers, a fact never acknowledged by the United States[12] or

[12]Ironically, the United States recently argued that a voter initiative was "an act of the legislature." *City of Klamath Falls, Oregon v. Babbitt*, __ F. Supp. __, 1996 WL 263637, *7 (D.D.C. May 10, 1996)("In fact, it appears (continued...)



any other opponent. Arizona adds a very direct restriction on its legislative and executive branches – the power of initiative (not present in the federal model) by which the people may enact and place law beyond the power of the executive and legislative branches to alter. ARIZ. CONST. ART. IV, § 6. If, therefore, the test of power is who may create a legally-enforceable code, *Alfred A. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1986), the people of Arizona possess a fundamental power distinct from that wielded by those who do not wish to protect the people's enactment.

Both constitutionally and practically, the Arizona initiative power is a most direct method of registering disagreement and disapproval "principally at the polls." *Minnesota*, 465 U.S. at 286. Permitting the executive and legislative branches to negate this power any time they can gin up a collusive suit would encourage the most devious shenanigans.

It would be far better to recognize that the people of Arizona, faced with the failure of their Governor to protect their exercise of power, may protect themselves and their rights through an appropriate representative or "next friend." *Whitmore v. Arkansas*, 495 U.S. 149 (1990). This Court's recent decisions clearly recognize this sort of representational standing. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.* ("*UFCW*"), __ U.S. __, 116 S.Ct. 1529, 1536, (1996); *Richards v. Jefferson County, Alabama*, __ U.S. __, 116 S.Ct. 1761.

Respondents' and amici's suggestion that the Governor represent the people ignores these cases. The Governor opposed the initiative both before and after enactment, and had no role in drafting or enacting it. The Governor, therefore, would not be a "natural adversary" to challengers, *UFCW*, 116

[12](...continued)
that the Court would unconstitutionally violate the right of the people of Oregon to govern themselves if the Court determined that the initiative was not an act of the Oregon legislature. *See* U.S. Const. amend. X.").

S.Ct. at 1536, and thus would not be an appropriate representative litigant.

Petitioners, on the other hand, were an indispensable part of the process of enacting Article XXVIII, and so are the challengers' "natural adversaries" in this case. As Petitioners have demonstrated, they are prepared to fight for the people's rights, *Ruiz*, Reply App. a7 ("[Petitioner] AOE . . . was the primary litigating defendant"), a position not shared by the Governor.

This approach is compelling here, where the Attorney General **wanted** to protect the people's power when the Governor would not. J.A. 160, 179-183. The lower court negated the clear language of 28 U.S.C. § 2403(b) by a bizarre application of the doctrine of judicial estoppel, *id.*, making the State a crippled "non-party" and denying it rights guaranteed by § 2403(b) and this Court. *Maine v. Taylor*, 477 U.S. at 136 (State able to continue, after United States abandons appeal, because it will be "bound by the conclusive adjudication that its [statute] is unconstitutional.").

Petitioners have representative standing to protect the rights of the people to the fruits of their reserved power. Permitting them to do so will uphold the Arizona Constitution and the fundamental power of self-government in Arizona.

## V. This Case Is Not Moot, Since There Are Live Controversies Remaining Between the Parties.

As with the other matters discussed above, despite a massive briefing, Respondents and amici (other than Respondent Arizonans Against Constitutional Tampering) overlook some important elements in their discussions of "case and controversy." Two of the four parties in this case intervened after judgment: Petitioners and Respondent AACT. Intervenors have full rights. *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1993). These parties are adverse, and their claims against the other are direct and immediate. *Ruiz*. Reply



App. a6-a8. AACT is also adverse to the State since AACT wishes to affirm the lower court decisions and the State wishes to vacate and dismiss them. Similarly, there is a controversy between Petitioners and the State, which turns on the appropriate interpretation of Article XXVIII; an adjudication which adopted one interpretation over the other, or which interpreted Petitioners' right to sue the State, would alter legal rights between the two.

As to all these claims, the parties' legal rights are determined solely by the lower court decision and a change in that decision will automatically alter the legal rights of the parties. "Because reversal of the judgment of the Court of Appeals would result in the automatic reinstatement of [Petitioners' rights] the controversy before us clearly remains live notwithstanding the [Governor's] decision to abandon its own appeal." *Maine v. Taylor*, 477 U.S. at 136.

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[13]The State's attack on AACT, State's Resp. Br. 23-24, is ill-advised. The State did not oppose AACT's intervention, was not present when AACT's qualifications were presented to the lower court at argument, and ignores the extensive briefings in this case and the extensive record to which the State was privy in *Ruiz*. AACT is composed of current government employees and elected officials, some of whom provided extensive discovery to the State's attorneys in *Ruiz*. Reply App. a6-a7. The State should not suggest now that AACT's intervention motion was defective because it didn't explicitly refer to what the court and the parties already knew.

## CONCLUSION

For the reasons stated here and in Petitioners' Opening Brief on the merits, the lower court should be reversed and other relief provided.

RESPECTFULLY SUBMITTED,

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No. 95-974

In The
# Supreme Court of the United States
October Term 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

# APPENDIX TO REPLY BRIEF FOR PETITIONERS

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August 26, 1996

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARMANDO RUIZ, LINDA AGUIRRE, JOHN PHILIP EVANS, ROSIE GARCIA, CANDIDO MERCADO, MANUEL PENA, JR., PETER RIOS, MACARIO SALDATE IV, FEDERICO SANCHEZ and VICTOR SOLTERO,
Plaintiffs-Appellants-Cross-Appellees,
v.
ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,
Intervenors, Defendants-Appellees-Cross-Appellants.

1 CA-CV 94-0235
DEPARTMENT A
OPINION
Amended August 1, 1996

Appeal from the Superior Court of Maricopa County
Cause No. CV 92-19603
The Honorable Jeffrey S. Cates

AFFIRMED IN PART; REVERSED IN PART

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WEISBERG, Judge

Plaintiffs appeal the trial court's grant of summary judgment in favor of Defendants State of Arizona, Fife Symington III, Governor of Arizona, Grant Woods, Attorney General of Arizona, and Intervenors Arizonans for Official English and Robert D. Park (AOE). Intervenors cross-appeal the trial court's denial of their motion for attorneys' fees. We affirm in part and reverse in part.

**FACTUAL AND PROCEDURAL HISTORY**

In November 1988, Arizona enacted, by voter initiative, Article XXVIII (Article 28) of the Arizona Constitution:

ARTICLE XXVIII.
ENGLISH AS THE OFFICIAL LANGUAGE

*1. English as the Official Language; Applicability.*

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3) (a) This Article applies to:

(i) the legislative, executive and judicial branches of the government,

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,

(iii) all statutes, ordinances, rules, orders, programs and policies,

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this section, as appropriate to the circumstances.

*2. Requiring This State to Preserve, Protect and Enhance English.*

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

*3. Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.*

Section 3. (1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

*4. Enforcement; Standing.*

Section 4. A person who resides in or does business in this



State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

In November 1988, Maria Yniguez, a bilingual state employee who communicated in both English and Spanish while at work, filed an action in federal district court against the State, Governor, Attorney General and Director of the Department of Administration of Arizona. She sought an injunction against the enforcement of Article 28 and a declaration that it violated the First and Fourteenth Amendments of the United States Constitution and federal civil rights laws.

In January 1989, Bob Corbin, the Arizona Attorney General at that time, issued his interpretation of Article 28. He concluded that the text of Article 28 did not require a broad ban on any non-English language because the use of other languages would not be prohibited in rendering government services. Instead, he reasoned, Article 28 required only that, as the official language of Arizona, English be used to conduct the official acts of the government. Op.Atty, Gen.Az. No. I89-009 (1989).

In *Yniguez v. Mofford,* 730 F. Supp. 309 (D. Ariz. 1990), the district court disagreed with the attorney general and interpreted Article 28 to forbid all government officers and employees from using any language other than English in the course of their government duties with the exception of the limited areas set out in section 3(2). So interpreted, the district court found that Article 28 was facially overbroad and violated the First Amendment. The injunction, however, was denied since there was no enforcement action pending against Yniguez.

The Governor[1] was satisfied with the judgment and chose not to appeal to the Ninth Circuit. AOE, however, the principal sponsors of the initiative to enact Article 28, intervened as defendants so they could pursue the appeal. The Attorney General was also allowed to intervene for the limited purpose of arguing for his interpretation of Article 28 or, alternatively, for the certification of the interpretation of Article 28 to the Arizona Supreme Court pursuant to Ariz. Rev. Stat. Ann. ("A.R.S.") section 12-1861. Arizonans Against Constitutional Tampering (AACT), the principal opponents of the ballot initiative, were allowed to intervene as plaintiffs.

In *Yniguez v. Arizonans for Official English,* 69 F.3d 920 (9th Cir. 1995), the Ninth Circuit refused to certify the question to the Arizona Supreme Court, and agreed with the district court that Article 28 was facially overbroad. Shortly after the Ninth Circuit issued its opinion, AOE filed a petition for a writ of certiorari in the United States Supreme Court, which was granted. 116 S. Ct. 1316 (Mar. 26, 1996).

In November 1992, the ten plaintiffs in the instant case brought an action in superior court against the Governor and Attorney General of Arizona.[2] They sought a declaratory judgment that Article 28 violates the First, Ninth, and Fourteenth Amendments to the United States Constitution. The plaintiffs are four state elected officials, five state employees, and one private citizen. They are all bilingual and regularly communicate in both Spanish and English as private citizens and during the performance of government business. At least

[1]Prior to ruling on the merits, the district court dismissed the State and Attorney General as defendants, finding that both were protected from suit pursuant to the Eleventh Amendment. 730 F. Supp. at 311-12. The district court also dismissed the Director of the Department of Administration as a defendant, finding that, since she had not enforced or threatened to enforce Article 28, no case or controversy existed as to her. *Id.* at 313.

[2] Plaintiffs later added the State of Arizona as a defendant in their first amended complaint.



four of the plaintiffs are members of AACT, including Armando Ruiz, who is the chair of that group. AOE intervened as a defendant shortly after the complaint was filed and thereafter was the primary defending litigant.

AOE moved for summary judgment. Plaintiffs responded and filed a cross-motion. The trial court granted AOE's motion, finding that Article 28:

1. is a content-neutral regulation that does not violate the First Amendment,
2. does not violate the Equal Protection Clause of the Fourteenth Amendment because there is no proof of discriminatory intent, and
3. does not violate the Ninth Amendment because such does not protect choice of language.

AOE moved for an award of attorneys' fees pursuant to A.R.S. section 12-2030. The Court denied the motion finding that section 12-2030 did not apply since AOE had not brought the action, and it was not in the nature of a petition for writ of mandamus.

Plaintiffs now appeal arguing that Article 28 should be interpreted as a blanket prohibition against all government employees using any language other than English in the performance of any government business. As such, they reason, Article 28 is a content-based regulation of speech that is contrary to the First Amendment. Plaintiffs also argue that Article 28 constitutes intentional discrimination against non-English speaking minorities and violates the Equal Protection Clause of the Fourteenth Amendment.

AOE answers that Article 28 should be narrowly construed as requiring the use of English only for official, binding government acts. So construed, they argue, Article 28 does not violate either the First or Fourteenth Amendments. AOE also cross-appeals the denial of their attorneys' fees.

Being mindful of the *Yniguez* litigation, this court requested additional briefing from the parties on the issues of collateral

estoppel and comity.

**DISCUSSION**

Judicial comity is an equitable principle, not a rule of law, in which courts of one state or jurisdiction give effect to the "judicial decisions of another, not as a matter of obligation[,] but out of deference and respect." *Bobala v. Bobala,* 33 N.E.2d 845, 849 (1940). "Comity between federal and state courts is necessary to prevent . . . unseemly conflicts of jurisdiction and to promote a decent and orderly administration of justice. [It] reflects sound public policy and should be applied in a spirit of liberality." 21 C.J.S. *Courts* § 210 (1990).

Both comity and federalism concerns underlie the various federal doctrines that have developed regarding abstention, *see e.g., Webb v. Webb,* 451 U.S. 493, 499-500 (1981); *Ohio Bureau of Employment Servs. v. Hodory,* 431 U.S. 471, 477 (1977), and the less cumbersome alternative of certification, *see Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 396 (1988); *Bellotti v. Baird*, 428 U.S. 132, 146-48 (1976). In *Yniguez*, the Ninth Circuit refused to abstain and certify the question of Article 28's proper interpretation to the Arizona Supreme Court, although the issue was pending in our state court system. The court found that abstention was inappropriate because the case involved a First Amendment challenge and because Article 28 was not obviously susceptible to a limiting construction. 69 F.3d at 930-31; *cf. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 507-10 (1985) (O'Connor, J. concurring); *Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987).

This court is now placed in the difficult position of deciding whether to reach the merits of this case or whether to defer to the pending federal adjudication. Comity, in the context of federal-state relations, more typically applies when a federal court finds that deference to a state court, on an issue of state law, is proper. States, however, should also defer, when appropriate, to federal courts. In *Bouwman v. Dep't of Social*



*Servs.*, 375 N.W.2d 806, 808 (Mich. App. 1985), a state court held that principles of comity required it to defer to a federal court decision concerning the interpretation and constitutionality of a state social services regulation. *See also Hall v. Nomura Sec. Int'l*, 268 Cal. Rptr. 45, 49 (App. 1990) (while lower federal court decisions are not binding, they are entitled to great weight); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990) (judicial comity affording deference to federal court decisions ensures uniformity of law and discourages forum shopping); *Van de Hav v. United States Nat'l Bank*, 793 P.2d 1388, 1390 (App. 1990) (noting the "practical advantages" of adopting the same statutory interpretation as a federal court), *aff'd on other grounds*, 829 P.2d 695 (Or. 1992).

In these circumstances, we conclude that it is appropriate for us to exercise our discretion and defer to the federal litigation and thereby accept the construction of Article 28 and the analysis that was set forth by the Ninth Circuit. Such deference promotes uniformity in interpretation of the law and discourages the parties from forum shopping. Further, the United States Supreme Court may choose to address the constitutionality of Article 28 and put both *Yniguez* and the instant case to rest.

We affirm the trial court's denial of AOE's attorneys' fees.

**CONCLUSION**

We exercise our discretion and accept the opinion of the Ninth Circuit. The judgment of the trial court is reversed as to Article 28 and affirmed as to the denial of AOE's attorneys' fees.

Sheldon H. Weisberg, Presiding Judge

CONCURRING:
Philip E. Toci, Judge
William F. Garbarino, Judge

34

Supreme Court, U.S.
FILED
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No. 95-974

In The
Supreme Court of the United States
October Term 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

# SUPPLEMENTAL BRIEF FOR PETITIONERS

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November 30, 1996

5 pp

## I. Arizona Supreme Court Accepts Review in *Ruiz*, But Stays All Proceedings Pending This Court's Decision.

In their Reply Brief, Petitioners reprinted the Arizona Court of Appeals decision in *Ruiz v. Symington*, No. 1 CA CV94-0235 (Ariz. App., August 1, 1996). In *Ruiz*, the Arizona Court of Appeals, without reaching the merits, deferred to the Ninth Circuit's decision below. Reply App. a9.

The State requested the Arizona Supreme Court to review the Arizona Court of Appeals' decision. State Defendants' Petition for Review in *Ruiz*, *supra*, at 1. The State attached its Respondent's Brief from this case. *Id.*, at Appendix. The *Ruiz* plaintiffs did not object to the State's request for review, attaching Arizonans Against Constitutional Tampering's Respondent's Brief from this case. Plaintiffs-Respondents' Motion for the Court to Take Judicial Notice, at I.

On November 19, 1996,[1] the Arizona Supreme Court granted review in *Ruiz*, and further ordered: "All proceedings are stayed pending decision by the United States Supreme Court." Supplementary Brief App. 1a.

## II. Ninth Circuit Decides Government Employee Speech On-The-Job Case, Again Inverting This Court's Government Speech Cases.

On October 4, 1996, the Ninth Circuit decided *Tucker v. Cal. Dept. of Education*, 97 F.3d 1204 (9th Cir. 1996). A government employee placed the phrase "Servant of the Lord Jesus Christ" and the acronym "SOTLJC" after his name on his government material. 97 F.3d at 1208. The Ninth Circuit, in an opinion by Judge Reinhardt, struck down the Department's resulting ban on religious displays and advocacy in the workplace. 97 F.3d at 1207.

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[1]Received by Petitioners on November 29, 1996, *reprinted* in App. hereto.

Although Petitioners have no position on the merits of the *Tucker* decision, the Ninth Circuit continues to invert this Court's recent "government speech" cases, misunderstanding the point that **government's interest in speech depends on the speaker's proximity to government**. The closer to government, the greater the government's interest.

In *Board of County Commissioners v. Umbehr*, 116 S.Ct. 2342, 2350 (1996), for example, this Court identified a speech "spectrum" which ranges from:

> government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to . . . . users of public facilities . . . and recipients of small government subsidies, who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing.

116 S. Ct. at 2350 (citations omitted).

Thus, the *Umbehr* speech spectrum might look like this:

**Closeness to Government —>**

A----------B----------C----------D---------->

| Private | Public | Public | Government |
|---|---|---|---|
| Persons | Facilities | Employees | Speech[2] |

In contrast, the Ninth Circuit, in *Tucker*, said, "[t]he government has a greater interest in controlling what materials are posted on its property than it does in controlling the speech of the people who work for it. . . " 97 F.3d at 1214. The Ninth Circuit's *Tucker* analysis reverses Points B and C on the *Umbehr* spectrum, just as, in this case, the Ninth Circuit

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[2]This portion of the speech spectrum - point D, when government itself speaks - is the issue here, but is not discussed explicitly in *Tucker* or *Umbehr*.



inverted government's power over its own speech and over that of those it employs to speak for it (*i.e.*, placing Point D before Point C). *See, e.g.*, Pet. App. 40a n. 24 (government speech cases, such as *Rosenberger v. Rector and Visitors of Univ. of Va.*, 115 S.Ct. 2510 (1995), and *Rust v. Sullivan*, 500 U.S. 173 (1991), apply only to speech of private parties). This spectral reversal is contrary to *Umbehr* and other government speech cases.

*Tucker* demonstrates once again why the *en banc* majority decision below should be reversed, and Article XXVIII upheld as not violating the First Amendment.

RESPECTFULLY SUBMITTED,

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**Supreme Court**
State of Arizona

November 22, 1996

**Re: ARMANDO RUIZ/LINDA AGUIRRE/JOHN PHILIP EVANS et al vs. J. FIFE SYMINGTON, III/GRANT WOODS/STATE OF ARIZONA et al**
Supreme Court No. CV-96-0493-PR
Court of Appeals No. 1 CA-CV 94-0235
Maricopa County No. CV 92-19603
United States Supreme Court No. 95-974

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 19, 1996, in regard to the above-referenced cause:

**ORDERED: Plaintiffs-Respondents' Motion for the Court to Take Judicial Notice = GRANTED.**

**FURTHER ORDERED: State Defendants' Petition for Review = GRANTED.**

**FURTHER ORDERED: All proceedings are stayed pending decision by the United States Supreme Court.**

The Clerk of the Court of Appeals, Division One, Phoenix, shall forward the remaining record to the Clerk of the Supreme Court.

NOEL K. DESSAINT, Clerk.

Supreme Court, U.S.
FILED
JUL 26 1996
CLERK

No. 95-974

# In the Supreme Court of the United States

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH, ET AL.,
PETITIONERS

*v.*

STATE OF ARIZONA, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE ADDRESSING STANDING

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## QUESTION PRESENTED

The United States will address the following question:

Whether petitioners have standing under Article III of the Constitution to pursue appellate review.

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# In the Supreme Court of the United States

OCTOBER TERM, 1995

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No. 95-974

ARIZONANS FOR OFFICIAL ENGLISH, ET AL.,
PETITIONERS

*v.*

STATE OF ARIZONA, ET AL.

---

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE**
**ADDRESSING STANDING**

---

## INTEREST OF THE UNITED STATES

The United States has an interest in ensuring that disputes over the constitutionality of state and federal laws are resolved by federal courts only when they are presented in the context of an Article III "case" or "controversy." The United States has a particular interest in ensuring that, when the government declines to appeal a judgment entered against it, persons without Article III standing are not permitted to appeal that judgment. The resolution of the question whether petitioners have standing to seek appellate review implicates those interests.

## STATEMENT

1. Article XXVIII of the Arizona Constitution was adopted by Arizona voters in November 1988 through a ballot initiative. Pet. App. 4a, 97a; see generally Ariz. Const. Art. IV, § 1 (initiative and referendum); Ariz. Rev. Stat. Ann. § 19-101 *et seq.* (1990) (same). Article XXVIII declares English to be the "official language" of Arizona and "the language of * * * all government functions and actions." Ariz. Const. Art. XXVIII, § 1(1)-(2). It further provides that, with certain specified exceptions, "this State and all political subdivisions of this State shall act in English and in no other language." *Id.* §§ 1(3)(a), 3(1)(a). The duty to "act in English" applies to "the legislative, executive, and judicial branches of government," and to "all government officials and employees during the performance of government business." *Id.* § 1(3). Article XXVIII contains exceptions that permit languages other than English to be used: (1) to assist students who are not proficient in English to the extent required by federal law; (2) to comply with other federal laws; (3) to teach foreign languages; (4) to protect public health or safety; and (5) to protect the rights of criminal defendants or victims of crime. *Id.* § 3(2). Article XXVIII also vests any person who resides in or does business in Arizona with standing to bring suit in state court to enforce Article XXVIII. *Id.* § 4. See Pet. vi-viii.

At the time Article XXVIII was adopted, respondent Maria-Kelley Yniguez was employed in the Arizona Department of Administration to process medical malpractice claims asserted against the State. Pet. App. 5a, 98a. Yniguez spoke Spanish to



claimants who spoke only Spanish and Spanish and English to claimants who were bilingual. *Ibid.* Believing that Article XXVIII would render her vulnerable to discipline if she continued to speak Spanish in those circumstances, she ceased to do so. *Id.* at 5a. Yniguez then filed suit in federal district court under 42 U.S.C. 1983 against the State of Arizona, its Governor, its Attorney General, and its Director of Administration. Yniguez claimed that Article XXVIII is facially invalid under the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Pet. App. 5a-6a, 97a. She requested a declaratory judgment, an injunction, and "all other relief that the Court deems just and proper." *Id.* at 6a, 95a n.1; see J.A. 55-60 (amended complaint).[1]

On January 24, 1989, the Attorney General of Arizona rendered an opinion concluding, *inter alia*, that although Article XXVIII requires that official acts of the State and political subdivisions be conducted in English, it does not prohibit the use of a language other than English where necessary to ensure the fair and effective delivery of services to members of the public. J.A. 61-76.

In a decision rendered on February 6, 1990 (Pet. App. 97a-114a), the district court dismissed the action as against all of the defendants except the Governor in her official capacity, *id.* at 99a-104a, and entered a declaratory judgment holding that Article XXVIII is unconstitutional on its face, *id.* at 105a-111a. The

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[1] A State legislator, Jaime Gutierrez, subsequently joined Yniguez as a plaintiff. The district court dismissed Gutierrez's claims (Pet. App. 112a), and he did not pursue an appeal.

court recognized that the Eleventh Amendment does not bar a suit for declaratory and injunctive relief against state officers in their official capacity if they have some connection to the enforcement of an allegedly unconstitutional state law. *Ibid.* But the court dismissed the Attorney General on the ground that he had no authority to enforce Article XXVIII against Yniguez; and it dismissed the Director of Administration on the ground that she had not threatened to enforce Article XXVIII against Yniguez. *Id.* at 100a-104a.[2] By contrast, the court determined that there was an Article III case or controversy between Yniguez and the Governor, because the Governor had stated that she expected all civil service employees to comply with Article XXVIII, and because, under Yniguez's interpretation of Article XXVIII, disciplinary sanctions could be imposed against Yniguez if she continued to speak Spanish during the course of her official duties. *Id.* at 102a-103a.

On the merits, the district court held that Article XXVIII is facially invalid under the First Amendment. Pet. App. 105a-109a. In so ruling, the court declined to rely on Ynigues's asserted "right to speak the language of her choice during the performance of her official duties." *Id.* at 106a. Rather, the court found that Article XXVIII inhibited the constitutionally protected speech of others, including the right of state legislators to speak to constituents in languages other than English, the right of state employees to comment officially on matters of public

[2] The court previously had dismissed the State of Arizona as a defendant on Eleventh Amendment grounds. Pet. App. 99a-101a.



concern in languages other than English, and the right of state judges to perform marriage ceremonies in languages other than English. Pet. App. 106a-107a. The court granted Yniguez's request for declaratory relief, but denied her request for an injunction on the ground that she had not established a threat of enforcement sufficient to warrant that relief. *Id.* at 111a-113a. The Governor decided not to appeal. *Id.* at 8a.

2. Petitioners Arizonans for Official English (AOE) and Robert D. Park then moved to intervene as defendants in order to pursue an appeal. J.A. 142. AOE is an unincorporated association that sponsored the ballot initiative that led to the adoption of Article XXVIII; Park is AOE's chairman. *Ibid.* The Attorney General of Arizona also sought to intervene in order to appeal. J.A. 141. In April 1990, the district court denied the motions to intervene, J.A. 138-149, holding, *inter alia*, that AOE and Park did not have Article III standing to appeal. J.A. 142-148.

In July 1991, the Ninth Circuit reversed the denial of petitioners' intervention motion, J.A. 157-184, holding that AOE and Park had standing under Article III to appeal the district court's declaratory judgment. J.A. 162-171. With respect to AOE, the court reasoned that state legislatures have standing to defend the constitutionality of state statutes and that AOE, as "the principal sponsor" of Article XXVIII, "stands in an analogous position to a state legislature." J.A. 166-167. With respect to Park, the court reasoned that Park could sue Yniguez in state court under Section 4 of Article XXVIII, and that the likelihood that he would do so was sufficiently great to create a live controversy between Park and Yniguez for Article III purposes. J.A. 169-171.

The court of appeals also held that the district court had correctly refused to permit the Attorney General to reenter the case as a full party. The court determined that, because the Attorney General had succeeded in having the case against him dismissed, he was estopped from reentering the case as a party. J.A. 179-181. The court nonetheless permitted the Attorney General to intervene in petitioners' appeal under 28 U.S.C. 2403(b) for the limited purpose of arguing in support of the constitutionality of Article XXVIII. J.A. 181-183.

3. Following the court of appeals' decision on intervention, the State notified the court that Yniguez had left her state job in April 1990, and it suggested that the case might therefore be moot. J.A. 187. The court of appeals held that the change in Yniguez's status did not render the case moot, because Yniguez could pursue a claim against the Governor for nominal damages. Pet. App. 94a-95a. Although Yniguez had not expressly requested nominal damages in her complaint, the court concluded that her request for "all other relief that the [District] Court deems just and proper" was sufficient. *Id.* at 95a. Yniguez had not appealed from the district court's judgment insofar as it failed to award nominal damages, but the court of appeals ruled that petitioners had to file another notice of appeal and that Yniguez could file a timely cross-appeal within 14 days thereafter. *Ibid.* In December 1992, petitioners filed a notice of appeal from the district court's declaratory judgment, and Yniguez filed a cross-appeal regarding nominal damages. *Id.* at 9a.[3]

[3] During the pendency of the appeal, the court of appeals granted a motion by respondents Arizonans against Constitutional Tampering (ACT) and its chairman, respondent Thomas Espinosa, to intervene as appellees in support of Yniguez. Pet. App. 10a-11a. ACT was the principal opponent of the ballot initiative. *Ibid.* The court of appeals did not reach the question whether ACT and Espinosa have standing under Article III to defend the district court's award of declaratory relief to Yniguez. *Id.* at 11a.



4. In December 1994, a panel of the Ninth Circuit affirmed the district court's declaratory judgment and reversed the district court's failure to award Yniguez nominal damages. *Yniguez* v. *Arizonans for Official English*, 42 F.3d 1217 (1995). The court of appeals agreed to rehear the case en banc. Pet. App. 4a. In October 1995, the en banc court of appeals reinstated the panel opinion with minor alterations. *Ibid.* By a six to five vote, the en banc court held that Article XXVIII is facially unconstitutional because it violates the First Amendment rights of state employees. *Id.* at 21a-59a.

## SUMMARY OF ARGUMENT

A. In order to seek appellate review of a judgment, intervenors must satisfy Article III standing requirements. They must therefore show that the judgment invades a legally protected interest that is likely to be redressed by a favorable decision on appeal. Petitioners AOE and Park cannot make that showing. The sole effect of the district court's declaratory judgment is to preclude the State from enforcing Article XXVIII against Yniguez. Only the State suffers an injury in fact from a judgment whose sole effect is to prevent the State from enforcing one of its laws against another person. If the State decides not to appeal such a judgment, private individuals do not have authority to supplant that

decision. *Diamond* v. *Charles*, 476 U.S. 54, 64-65 (1986). Consistent with that understanding of Article III, this Court has summarily rejected an effort by the sponsor of a ballot initiative to appeal a lower court judgment holding an initiative unconstitutional when the State itself had decided not to appeal. *The Don't Bankrupt Washington Committee* v. *Continental Ill. Nat. Bank*, 460 U.S. 1077 (1983).

B. AOE does not have standing based on the concept of legislative standing. A state legislature has standing to appeal a decision holding a state statute unconstitutional only when state law authorizes the legislature to represent the State's interest in court. *Karcher* v. *May*, 484 U.S. 72, 82 (1987). Article XXVIII does not authorize its sponsor to represent the State's interest in court. AOE also has not identified any other provision of Arizona law that provides such authorization. Thus, even if AOE could be analogized to a state legislature, it would not have standing to appeal.

In any event, AOE is not analogous to a state legislature. The fundamental attributes of a state legislature are that its members are elected by the people and it has authority to make laws. AOE does not have either of those attributes. The voters have not elected AOE to represent their interests, and the voters, not AOE, enacted Article XXVIII.

C. Park's standing to enforce Article XXVIII in state court does not supply him with standing to appeal in federal court. An individual's generalized interest in enforcing a law is not sufficient to satisfy Article III, and that interest cannot be converted into a particularized injury simply because state law denominates it as such. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Moreover, because



state courts are free to exercise their own independent judgment concerning whether Article XXVIII is constitutional, the district court's judgment in this case does not interfere with Park's right to enforce Article XXVIII in state court. Finally, whatever controversy might once have existed between Park and Yniguez by virtue of Park's right to enforce Article XXVIII in state court ended when Yniguez left her state job.

## ARGUMENT

### PETITIONERS DO NOT HAVE STANDING TO PURSUE APPELLATE REVIEW

#### A. Private Individuals Do Not Have Standing To Seek Appellate Review Of A Judgment The Sole Effect Of Which Is To Prevent A State From Enforcing One Of Its Laws Against Another Person

Article III of the Constitution limits the power of federal courts to deciding "Cases" and "Controversies." One aspect of the case or controversy requirement is that a party who invokes the jurisdiction of a federal court must have standing to sue. *Northeastern Fla. Chapter, Associated Gen. Contractors* v. *Jacksonville*, 508 U.S. 656, 663 (1993). To establish Article III standing, a party must show "as an 'irreducible minimum' that there [is] (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United Food & Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 116 S. Ct. 1529, 1533 (1996) (*Local 751*). The injury-in-fact requirement refers to "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or

imminent." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A generalized interest in the proper application of the Constitution and laws does not satisfy the injury-in-fact requirement. *Id.* at 573-576.

The requirement that a party who invokes the court's jurisdiction must have Article III standing applies to those who seek appellate review as well as those who initiate litigation. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986). "[T]he decision to seek review must be placed in the hands of those who have a direct stake in the outcome. * * * It is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Ibid.* Because the decisions below do not invade any "legally protected interest" held by petitioners, they do not have Article III standing to seek appellate review of those decisions.

The district court entered a declaratory judgment that Article XXVIII of the Arizona Constitution violates the First Amendment, and that judgment ran solely in favor of Yniguez and solely against the Governor of Arizona. Because Yniguez did not obtain class certification, and because the Governor of Arizona was the only defendant, the sole effect of the district court's judgment was to preclude the State of Arizona from enforcing Article XXVIII against Yniguez. The State had standing to seek appellate review of the judgment. *Diamond*, 476 U.S. at 62. But the State, through its Governor, decided not to appeal. The State likewise did not seek review of the court of appeals' decision affirming the district court's declaratory judgment. Private parties do not have standing to supplant the deliberate decision of a State not to appeal a judgment entered against the State or its officials, when the sole effect of that



judgment is to prevent the State from enforcing one of its laws against another person. *Id.* at 64-65.[4]

This Court's decision in *Diamond* is controlling on that point. In *Diamond*, physicians brought suit against Illinois state officials to enjoin a State law governing abortions. After defending the law in the district court and the court of appeals, the State declined to appeal to this Court, and a private physician opposed to abortions who had intervened in the district court sought to appeal the judgment. The Court dismissed the appeal for lack of jurisdiction. The Court held that "an intervenor's right to continue a suit in the absence of the party on whose side intervention is permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III," 476 U.S. at 68, and that the physician had failed to show that he had standing under Article III to appeal from the decision below. *Id.* at 63-68. The Court reasoned that "concerns for state autonomy" preclude private individuals from continuing litigation in defense of a state law after the State has decided not to appeal. *Id.* at 65. The

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[4] After the Governor declined to appeal the district court's decision, the State's Attorney General sought to intervene as a party in order to appeal. The district court denied intervention. J.A. 140-142. The court of appeals affirmed the denial, except that it permitted the Attorney General to intervene as a non-party in petitioners' appeal. J.A. 179-183. The Attorney General did not seek review of that ruling. Nor did the State or any state official seek review of the court of appeals' decision affirming the district court's judgment declaring Article XXVIII unconstitutional. Accordingly, for present purposes, it must be assumed that the State acquiesced in both the district court's judgment declaring Article XXVIII unconstitutional and the court of appeals' decision affirming that judgment.

Court concluded that "only the State has the kind of 'direct stake' identified in *Sierra Club* v. *Morton*, 405 U.S. [717, 740 (1972)], in defending the standards embodied in [a legal] code." *Diamond*, 476 U.S. at 65.

The holding in *Diamond* is supported by strong practical and institutional considerations. The State itself is in the best position to decide whether there should be appellate review of a judgment entered against the State or its officials, including a judgment that prevents the State from enforcing one of its laws. Principles of federalism reinforce Article III's requirement that a federal court respect the State's decision not to appeal. A State may have a wide variety of reasons for declining to appeal: the decision might have a limited impact; the State might wish to await a case that presents the legal question in a more appealing factual context; or the decision might not interfere with a particular administration's legal views or enforcement priorities. See *United States* v. *Mendoza*, 464 U.S. 154, 160-162 (1984).

Factors such as those could well have affected the State's decision not to seek appellate review of the district court's judgment in this case. Although the legal reasoning in the district court's opinion was broad, the court's declaratory judgment applied only to a single individual, respondent Yniguez, and would not have precedential effect in other cases in federal court. See, *e.g.*, *United States* v. *Articles of Drug*, 818 F.2d 569, 572 (7th Cir. 1987). By the same token, as the district court observed in denying AOE and Park's motion to intervene, the declaratory judgment was not binding on the state courts and accordingly would not affect the ability of Arizona residents to enforce Article XXVIII in state court. J.A. 147-148 (citing *Moore* v. *Sims*, 442 U.S. 415, 428 (1979)).



Moreover, the result reached by the district court was not substantially adverse to the position of the State of Arizona even on the narrow issue of Yniguez's ability to speak English on the job, because the Attorney General of Arizona had in any event interpreted Article XXVIII not to prevent individuals such as Yniguez from providing assistance to persons in a language other than English, "where such assistance is reasonably needed to ensure fair and effective delivery of governmental services to non-English speakers." J.A. 71-72. In short, the State could reasonably have decided that an appeal would not be in the State's interest. Private parties should not be permitted to override such determinations by state officials.

Consistent with the understanding of Article III set forth in *Diamond*, this Court has summarily rejected an effort by sponsors of a ballot initiative to appeal from a court of appeals decision holding the initiative unconstitutional. *The Don't Bankrupt Washington Committee* v. *Continental Ill. Nat. Bank*, 460 U.S. 1077 (1983). In that case, the court of appeals held that an initiative that interfered with the State's contractual obligation to finance three nuclear power plants violated the Contract Clause of the Constitution, Art. I, § 10, Cl. 1. *Continental Ill. Nat. Bank* v. *State of Wash.*, 696 F.2d 692 (9th Cir. 1983). The State defended the initiative in the district court and the court of appeals, but decided not to appeal from the court of appeals' decision. See 82-1445 Mot. of Appellee the United States of America to Dismiss or Affirm at 22-23, 26. The sponsor of the initiative had intervened in the district court, and it sought to appeal the court of appeals' decision to this Court. This Court summarily dismissed the appeal

for want of jurisdiction, "it appearing appellant lacks standing to bring this appeal." 460 U.S. at 1077.

The court of appeals in this case acknowledged the relevance of the analysis in *Diamond*, but concluded that "AOE's and Park's interest in Article XXVIII is qualitatively different from the physician's interest in the Illinois abortion law at issue in *Diamond*." J.A. 165. For reasons that follow, that conclusion is incorrect. There is no relevant distinction between this case and *Diamond*, and petitioners therefore lack standing to seek appellate review.

### B. AOE Does Not Have Standing To Appeal Based On Legislative Standing, Representational Standing, Or Its Efforts In Sponsoring The Initiative

1. The court of appeals permitted AOE to appeal from the district court's judgment by invoking the concept of "legislative standing." J.A. 165. The court concluded that a legislature has standing to defend a statute it enacts. J.A. 165-167. It then reasoned that AOE occupies the same position with respect to Article XXVIII that a state legislature occupies with respect to a state statute. *Ibid.* That reasoning is seriously flawed.

a. To begin with, a legislature does not automatically have Article III standing to appeal a judgment holding unconstitutional or otherwise restricting the enforcement of laws it enacts. In the federal system, separation of powers principles would preclude Congress from appealing a decision holding a federal statute unconstitutional if the Solicitor General decided not to appeal. See *Lewis* v. *Casey*, No. 94-1511 (June 24, 1996), slip op. 8 n.3 (standing doctrine "has a separation of powers component which keeps courts within certain traditional bounds vis-a-vis the



other branches, concrete adverseness or not"). The Constitution gives the President alone the responsibility to "take Care that the Laws be faithfully executed," Art. II, § 3, and that responsibility includes the authority to conduct litigation on behalf of the United States in the federal courts. *Buckley* v. *Valeo*, 424 U.S. 1, 138-139 (1976). The Constitution gives Congress only "legislative Powers," Art. 1, § 1, and the "power to seek judicial relief cannot possibly be regarded as merely in aid of the legislative function." *Buckley*, 424 U.S. at 138. Congress may, at times, disagree with an Executive Branch decision not to appeal. Under the Constitution, however, it does not have authority to override such a decision by taking an appeal itself.[5] Just as Congress cannot overrule Executive action directly by means of a legislative veto, *INS* v. *Chadha*, 462 U.S. 919 (1983), Congress cannot accomplish the same result indirectly by invoking the assistance of the federal courts to prosecute its disagreement with the Executive Branch.[6]

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[5] Cf. 2 U.S.C. 288e(a) (the Senate Legal Counsel "shall be authorized to intervene only if standing to intervene exists under section 2 of Article III of the Constitution of the United States").

[6] In *Burke* v. *Barnes*, 479 U.S. 361 (1987), we argued (Gov't Br. 12-30; Gov't Reply Br. 3-11) that neither Congress nor its Members had standing under Article III to bring an action in federal court challenging the President's conclusion that a bill did not become a law by virtue of the "Pocket Veto Clause" of the Constitution, Art. I, § 7, Cl. 2. The Court did not reach the congressional standing question because it concluded that the controversy had become moot. 479 U.S. at 363, 364 n. *; see also *id.* at 366 (Stevens, J., dissenting) (stating that there was a "serious question" of the standing of the Senate

The question whether a state legislature has standing to appeal on behalf of the State if the responsible officials of the State's executive branch choose not to appeal a decision holding a state statute unconstitutional depends on how the State allocates power among its branches of government. See *Dryer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State."). In States that adhere to the federal model of separation of powers, the legislature would not have standing to appeal. For example, States commonly give their Attorneys General exclusive authority to represent the State's interests in litigation. 7A C.J.S. *Attorney General* § 11(c) (1980) (citing cases); see also *Mountain States Legal Found.* v. *Costle*, 630 F.2d 754, 771 (10th Cir. 1980), cert. denied, 450 U.S. 1050 (1980). In such States, if the Attorney General acquiesces in a judicial decision holding a state law unconstitutional, a state legislature would not have standing to appeal. Only if state law affirmatively authorizes the legislature to represent the State's interest in litigation would a legislature have standing to appeal. *Karcher* v. *May*, 484 U.S. 72, 82 (1987).

Thus, if AOE were analogized to a state legislature, it would have standing to appeal only if state law authorized it to represent the State's interest in

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and the 33 individual Members of the House of Representatives who were plaintiffs in the case).



litigation. Article XXVIII does not itself authorize AOE to represent the State's interest in litigation challenging that provision. As petitioners note (Br. 43), Arizona law gives an individual or organization that sponsors ballot initiatives certain "specific duties and rights." But those duties and rights are confined to the initiative process itself, and they end as soon as that process comes to a close. See generally Ariz. Rev. Stat. Ann. § 19-101 *et seq.* (1990). Petitioners have not cited any provision of Arizona law that authorizes the sponsor of an initiative to represent the State's interest in litigation arising under or challenging a law or constitutional amendment that was adopted through the initiative process. For that reason, even assuming the court of appeals correctly analogized AOE to a state legislature, the court erred in concluding that AOE has standing to appeal in order to defend Article XXVIII.

b. In holding that a legislature automatically has standing to appeal when the executive branch declines to do so, the court of appeals relied (J.A. 165-166 & n.2) on this Court's decisions in *Karcher* v. *May*, *supra*; *Coleman* v. *Miller*, 307 U.S. 433 (1939); and *INS* v. *Chadha*, 462 U.S. 919, 940 (1983). Those decisions do not establish such a rule.

In *Karcher*, the President of the New Jersey Senate and the Speaker of the General Assembly intervened in the district court on behalf of the state legislature to defend a state statute against a constitutional challenge. The district court held the statute unconstitutional, and the court of appeals affirmed. This Court dismissed the two legislators' appeal of the court of appeals' judgment, because they had lost their positions prior to the appeal and therefore ceased to be "parties" for purposes of the

Court's jurisdiction under 28 U.S.C. 1254. 484 U.S. at 77-81. The Court also held that the New Jersey legislature and the two legislators were proper parties in the court of appeals. *Id.* at 81-82. But that was because the New Jersey Supreme Court had authoritatively construed state law to authorize the state legislature and its leaders to represent the State's interest in court. *Ibid.* *Karcher* therefore does not hold that a state legislature always has a legally protected interest in defending the constitutionality of legislation that it has passed. *Karcher* stands for the more limited proposition that a state legislature has Article III standing to appeal a federal court judgment holding a state law unconstitutional when state law authorizes the legislature to represent the State's interest in court.

In *Coleman*, state senators brought a mandamus action in the Kansas Supreme Court against the secretary of the state senate to contest the participation of the State's lieutenant governor in a vote of the state senate approving ratification of a proposed amendment to the United States Constitution. 307 U.S. at 435-436.[7] The Court held that the legislators had standing to seek review in this Court of an adverse decision by the Kansas Supreme Court because the legislators' interest "in maintaining the effectiveness of their votes" (*id.* at 438) had been "treated by the state court as a basis for entertaining and deciding the federal questions" (*id.* at 446).

[7] Article V of the Constitution provides that a constitutional amendment, duly proposed, shall be valid "when ratified by the Legislatures of three fourths of the several States." The state senators contended that, for purposes of Article V, the Lieutenant Governor should not be regarded as part of the state "Legislatur[e]."



*Coleman* therefore holds only that state law may give a legislator an interest in the effectiveness of his vote within the state legislative process that is sufficient to give this Court jurisdiction over an appeal from a state court decision that affects that interest. *Coleman* does not suggest that the legislators would have had standing to initiate litigation in federal court. *Barnes* v. *Kline*, 759 F.2d 21, 62-63 (D.C. Cir. 1985) (Bork, J., dissenting), vacated as moot, 479 U.S. 361 (1987). It does not suggest that a legislator has a legally cognizable interest in an effective vote that exists independent of state law. And it does not suggest that such an interest would be implicated in a case in which the vote on a bill was counted correctly, the bill became law, and the law is subsequently challenged on substantive constitutional grounds. *Coleman* is therefore inapposite here.

In *Chadha*, one House of Congress "vetoed" the suspension of an alien's deportation pursuant to a legislative veto provision in the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2) (1976). The Attorney General ordered the alien deported following the exercise of the one-House veto, and the alien sought judicial review of the final order of deportation. In the court of appeals, the INS agreed with the alien that the legislative veto provision was unconstitutional, and the court of appeals so held and set aside the order of deportation. The INS then appealed to this Court from the judgment that prohibited it from deporting the alien. 462 U.S. at 928. The Court held that the INS was aggrieved by the court of appeals' decision holding an Act of Congress unconstitutional, and therefore was entitled to take an appeal pursuant to 28 U.S.C. 1252 (1976). 462 U.S. at 929-931.

The Court in *Chadha* further held that because the INS was seeking to deport the alien, there was a "case or controversy" under Article III between the INS and the alien. 462 U.S. at 939-940. In that regard, the Court noted that "Congress is the proper party to defend the validity of a statute when an agency of the government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is * * * unconstitutional." *Id.* at 940. That statement does not suggest, however, that Congress would have had authority to appeal if the responsible Executive Branch officials had declined to do so. Rather, that statement simply means that, when there is already a case or controversy before the court, and the Executive Branch agrees with the other party that the statute is unconstitutional, Congress is an appropriate entity to offer a defense of the statute. This Court often invites someone to argue as amicus curiae in support of the judgment when the United States adopts the same view as its opposing party on an issue before this Court, even though the person invited to participate as amicus obviously would not have Article III standing to prosecute the case as a party. *E.g.*, *Ornelas* v. *United States*, 116 S. Ct. 1657, 1661 n.4 (1996) (noting that a member of the bar of this Court had been invited to argue as amicus curiae in support of the judgment). Congress's role in *Chadha* is consistent with that practice.[8]

[8] The Court in *Chadha* cited two decisions as authority for Congress's role in that case. 462 U.S. at 940. Those decisions, *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9 (1968), and *United States* v. *Lovett*, 328 U.S. 303, 304 (1946), support the understanding of *Chadha* discussed above. In *Cheng Fan Kwok*, the Court invited a member of the Bar of the Court to appear as amicus curiae in support of the judgment on a statutory issue after the INS aligned itself with the petitioner on the question before the Court. 392 U.S. at 210 n.9. In *Lovett*, the Solicitor General filed a petition for a writ of certiorari on behalf of the United States, but agreed with respondents that a federal statute was unconstitutional. 328 U.S. at 306. By special leave of Court, Congress appeared as amicus curiae to defend the statute. *Id.* at 304, 306.



c. Even if it is assumed that a state legislature always has Article III standing to defend the constitutionality of a state statute, the Ninth Circuit's analogy between AOE and a legislature is misconceived. The fundamental attributes of a legislature are that its members are elected by the people and it is vested with the "authority to make laws." *Buckley*, 424 U.S. at 139 (quoting *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928)). AOE does not have either of those attributes.

AOE is an unincorporated association (Pet. Rule 29.1 Statement). AOE is not elected by the people, and the individual citizens who voted in favor of Article XXVIII in the referendum did not thereby select AOE to be their representative. Indeed, many supporters of an initiative might not be supporters of the initiative's sponsors, and thus might vote for the initiative *despite* their disapproval of the sponsors.

Although AOE proposed the initiative that led to the enactment of Article XXVIII, AOE itself did not enact the amendment, nor could it. Under the Arizona Constitution, the power to enact laws and constitutional amendments through the initiative process is vested in the people of Arizona. Ariz. Const. Art. IV. Arizona voters, not AOE, enacted Article XXVIII by casting ballots at the polls. And the voters, not AOE,

have the power to amend or repeal Article XXVIII in the future.

AOE's drafting of Article XXVIII does not warrant treating AOE like a legislature. Legislation is often drafted by legislative staff members or even lobbyists. The performance of that task cannot transform an unelected association without the power to enact laws into the functional equivalent of a legislature.[9]

2. Relying on *Local 751*, AOE asserts (Br. 42-43) that it has "representational standing" to defend Article XXVIII on behalf of "the people of Arizona." Nothing in *Local 751*, however, suggests that AOE enjoys representational standing.

As *Local 751* reaffirms, one requirement for representational standing is that the persons represented must have standing in their own right. 116 S. Ct. at 1534-1535. That requirement is not satisfied here. The only harm suffered by any individual citizen of Arizona as a result of the decisions below is the generalized one of not having one of the State's laws enforced. That generalized injury is insufficient to satisfy Article III. *Lujan*, 504 U.S. at 573-574.

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[9] Because AOE cannot vote, it also could not be analogized to an individual legislator. Moreover, even if a legislature has Article III standing to taken an appeal in a case involving the constitutionality of its enactments, individual legislators do not, for the interest that they would be asserting is one that belongs to the legislature as a collective body, rather than to individual members. See *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 544 (1986) (appellant's status as member of school board "does not permit him to 'step into the shoes of the Board' and invoke its right to appeal"; "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take").



*Local 751* also makes clear that representational standing is confined to relationships "recognized either by common-law tradition or by statute" that "rebut the background presumption * * * that litigants may not assert the rights of absent third parties." 116 S. Ct. at 1536. AOE does not identify any "common-law tradition or * * * statute" that permits an unincorporated association to sue or be sued on behalf of the entire population of a State. AOE is effectively asserting a variation on *parens patriae* standing, and the right to act as *parens patriae* belongs exclusively to the State itself. See generally *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1986).

3. AOE also argues (Br. 46) that it has suffered concrete Article III injury because it devoted time and money to sponsoring the ballot initiative. The time and money that AOE devoted to the initiative effort were not incurred because of the decisions below, however, and they would not be recouped if those decisions were reversed. As a result, there is no "causal relationship" (*Local 751*, 116 S. Ct. at 1533) between the costs that AOE has incurred and the judicial decisions about which it complains.

4. AOE contends that, because state officials cannot be counted on to defend initiatives, the sponsors of the initiative should have standing to defend them. Pet. 42, 45. AOE does not cite any evidence, however, that state officials are less willing to defend initiatives than other state laws. Even if they were, however, that fact would not suggest that private individuals or entities have standing under Article III

of the Constitution to represent the State's interests in federal court.[10]

If persons within the State believe that responsible state officials have unwisely failed to appeal a federal court decision, their remedy is a political one. "[O]ur system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that their elected representatives are delinquent in performing duties committed to them." *United States* v. *Richardson*, 418 U.S. 166, 179 (1974). The voters in Arizona are not without such a remedy here. See Ariz. Const. Art. VIII, Pt. 1 (any elected official holding public office is subject to recall by the qualified electorate).

### C. Park's Standing To Enforce Article XXVIII In State Court Does Not Give Him Standing To Seek Appellate Review In Federal Court

The court of appeals predicated Park's standing on Section 4 of Article XXVIII, which provides that any "person who resides in or does business in" Arizona "shall have standing to bring suit to enforce" Article XXVIII in state court. J.A. 169-171. The existence of Section 4, however, does not establish that the decisions below impose an injury in fact on Park.

States may create interests, the invasion of which create standing. *Diamond*, 476 U.S. at 65 n.17. In such cases, however, the requirements of Article III

[10] Section 4 of Article XXVIII contains a mechanism for private persons to enforce the restrictions of Article XXVIII in *state* court. See p. 24, *infra*. As a result, AOE's lack of standing to appeal in federal court does not preclude supporters of the initiative in which Article XXVIII was approved from having any role in its implementation and enforcement.



must still be met. *Ibid.* A state resident's generalized interest in the enforcement of a law is insufficient to satisfy Article III, and that interest cannot be converted into a particularized injury simply because state law denominates it as such. *Lujan*, 504 U.S. at 571-578. The provision conferring standing on Park to enforce Article XXVIII in state court therefore does not relieve him of the requirement of demonstrating that he would suffer personal and individualized harm from the decisions below. *Ibid.* Park has not made such a showing. In particular, he has not identified any way in which he would suffer personal harm if Yniguez were permitted to speak Spanish while working for the State.

In addition, as already discussed, the sole effect of the district court's declaratory judgment is to preclude the *State* from enforcing Article XXVIII against Yniguez. That judgment does not prevent Park from exercising his right under Section 4 to enforce Article XXVIII in state court. In such a suit, the state courts would be free to exercise their own independent judgment concerning whether Article XXVIII satisfies constitutional standards; they would not be bound by the decisions below in this case. *Asarco, Inc.* v. *Kadish*, 490 U.S. 605, 617 (1989) ("state courts * * * possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretation of federal law"); *Lockhart* v. *Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law); *Freeman* v. *Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992) (same). Thus, the district court's decision in this case does not affect Park's

right under Section 4 to enforce Article XXVIII in state court.

Finally, Yniguez's departure from her state job eliminated whatever controversy might otherwise have existed between her and Park by virtue of Section 4. Park could not "enforce" Article XXVIII by bringing suit against Yniguez under Section 4, because Yniguez could not violate Article XXVIII once she ceased to be a State employee.[11]

## CONCLUSION

For the reasons discussed, petitioners do not have standing to seek appellate review.

Respectfully submitted.

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[11] Because petitioners do not have standing, the constitutionality of Article XXVIII is not properly before the Court.

(12)

Supreme Court, U.S.
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No. 95-974

In the

# Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,
*Petitioners*,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; and ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,
*Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a state constitutional provision declaring English the official language of the state and requiring English to be used to perform government business violates the Free Speech Clause of the First Amendment.

2. Whether a government employee has a free speech right to disregard the official language of her employer and choose the language in which to perform government business.

3. Do petitioners have standing to maintain this action?*

4. Is there a case or controversy with respect to respondent Yniguez?*

* Pursuant to Order of the Court, March 25, 1996.

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No. 95-974

In the

# Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,

*Petitioners*,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; and ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

*Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

### INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned

citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases concerning First Amendment issues. For example, PLF participated as amicus curiae in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. ____, 115 S. Ct. 2510 (1995), and PLF attorneys, representing petitioners, argued successfully before this Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990).

Amicus seeks to augment the argument in the petitioners' brief. PLF believes that its public policy perspective and litigation experience dealing with the First Amendment will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.3, written permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

## STATEMENT OF THE CASE

This case comes to this Court from a 6-5 *en banc* decision rendered by the Ninth Circuit Court of Appeals, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (*Yniguez III*), which declared that an article of the Constitution of the State of Arizona violated the First Amendment rights of a state employee, Maria-Kelley Yniguez. The Article, entitled "English as the Official Language," requires that "[t]his State and all political



subdivisions of this State shall act in English and in no other language." Arizona Const., Art. XXVIII, § 3(1)(a).

Ms. Yniguez is fluent in both Spanish and English. In 1988, after passage of the initiative making Article XXVIII a part of the state constitution, she ceased using Spanish in the course of her job with the Arizona Department of Administration, where she was hired to process insurance claims against the state. Previously, Ms. Yniguez had spoken in Spanish to the Spanish-speaking members of the public with whom she dealt. *Yniguez III*, 69 F.3d at 924.

Ms. Yniguez brought this present action in federal District Court in November of 1988 against the State of Arizona, then-Governor Mofford, the Arizona Attorney General, and the Director of the Department of Administration, alleging a violation of her right to free speech under the First Amendment to the Constitution of the United States. *Yniguez III*, 69 F.3d at 925. At no time had defendants sought enforcement of Article XXVIII against Ms. Yniguez; rather, Ms. Yniguez sought declaratory and injunctive relief on the basis that Article XXVIII was facially overbroad. *Id.*

On jurisdictional grounds, all defendants to the action were dismissed except for Governor Mofford. *Id.* After plaintiff prevailed, Arizonans for Official English (AOE), the organization which was the principal sponsor of the initiative which created Article XXVIII, *id.* at 926, sought to intervene as defendants and appellants when Governor Mofford chose not to appeal. *Id.* at 925. Although the District Court originally denied the motion of AOE to intervene, the Ninth Circuit, in *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991) (*Yniguez I*), reversed the District Court and found that AOE had standing to intervene under both Federal Rule of Civil Procedure 24(a)(2), and Article III. Additionally, Arizona's

Attorney General, who had been denied intervention on the basis that he could not be reinstated as a party, was allowed to intervene at the Ninth Circuit for the limited purpose of arguing the constitutionality of Article XXVIII. *Yniguez III*, 69 F.3d at 926.

Because Ms. Yniguez had resigned her position with the Arizona Department of Administration in 1990, the State of Arizona filed a "suggestion of mootness." *Yniguez III*, 69 F.3d at 926. However, the Ninth Circuit, in *Yniguez v. Arizona*, 975 F.2d 646 (9th Cir. 1992) (*Yniguez II*), rejected the mootness suggestion, stating that Yniguez had the right to appeal the District Court's denial of nominal damages. *Yniguez III*, 69 F.3d at 926. Despite the fact that the interpretation of Article XXVIII had not been ascertained by a controlling state appellate court, both the District Court and the Ninth Circuit denied defendants' motions for abstention and certification to Arizona state court on the premise that the Article was "not susceptible of a narrowing construction" distinct from the federal court's interpretation. *Id.*

Finding no bar to its exercise of jurisdiction, the Ninth Circuit in *Yniguez III* upheld the District Court's opinion that Article XXVIII violated the First Amendment. It determined that plaintiff's decision to speak Spanish, in the context of conveying information from the state to the public, constituted speech of "public concern" entitled to First Amendment protection. *Id.* at 940. The Ninth Circuit also found that Arizona's countervailing interest in "protecting democracy by encouraging 'unity and political stability;' [and] encouraging a common language," *id.* at 944, were not sufficiently important, nor sufficiently served by the Article's implementation, to outweigh plaintiff's First Amendment rights.



## SUMMARY OF ARGUMENT

Article XXVIII of the Arizona Constitution imposes an English-only restriction upon Arizona State employees. In 1988, respondent Yniguez, then a state employee, sued state officials, contending that Article XXVIII violated her First Amendment rights.

Arizona's former governor, the defendant at the trial court, declined to defend the constitutionality of Article XXVIII, a voter initiative. Consequently, petitioners AOE and Robert D. Parks intervened and are now the only parties seeking review of the lower court decisions. *Yniguez III*, 69 F.3d at 926. Under *Diamond v. Charles*, 476 U.S. 54 (1986), petitioners must establish their right to intervene under Federal Rule of Civil Procedure 24(a)(2) and their standing under Article III in order to pursue the appeal. *Id.* at 69. As the principal sponsor of the initiative, *Yniguez III*, 69 F.3d at 926, AOE has a significant tie to the subject matter of the litigation. Further, its interests in preserving Article XXVIII and the effectiveness of the initiative process in general cannot be protected in the absence of intervention. These same factors support the conclusion that AOE meets the requirements of Article III standing. Under the facts of this case, given the state's official indifference to its own constitutional provision, AOE is the only party that can ensure the presence of a live case or controversy and has standing to pursue this appeal.

Because respondent Yniguez no longer works for the State of Arizona, and is therefore no longer subject to Article XXVIII's language restriction, *Yniguez II*, 975 F.2d at 647, her interest should be deemed moot. Although she ostensibly has a claim to nominal damages, her claim should

be discounted because it was essentially created by the Ninth Circuit as a basis for saving Ms. Yniguez from dismissal. *Yniguez II*, 975 F.2d at 647 n.2. Because Article III standing is a prerequisite to retaining federal court jurisdiction, *Warth v. Seldin*, 422 U.S. 490, 498 (1975), she is also foreclosed from asserting third party standing to pursue the case on behalf of other parties not before the Court. *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 955 (1984).

The Ninth Circuit incorrectly concluded that plaintiff's desire to speak Spanish to members of the public while engaged as a state employee in the conduct of state business is a speech interest entitled to First Amendment protection. This Court has qualified public employee free speech rights with three requirements: that the speech be made by the employee as a citizen; that the speech address a matter of public concern; and that the employee's free speech rights outweigh the state's countervailing interest in applying its policy. *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 568 (1968). Although the Ninth Circuit attempted to leverage respondent's arguments into established precedents, this case is not analogous to employee speech cases previously addressed by this Court. First, Article XXVIII does not impact employees when they are speaking "as a citizen" since, by its terms, it applies only to "state employees during the performance of government business." Art. XXVIII, § 1(3)(a)(iv). Second, because the state may validly regulate speech when the state itself is the speaker, *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. at 2518, the speech regulated by Article XXVIII is not speech of "public concern" entitled to First Amendment protection. Third,



because no First Amendment interests of state employees are infringed by Article XXVIII, asserted state interests in promoting a common language outweigh any employee interests.

## ARGUMENT

## I

## PETITIONERS HAVE STANDING TO MAINTAIN THIS ACTION

### A. Petitioners Meet the Requirements of Federal Rule of Civil Procedure 24(a)(2) and Article III

The unusual route by which petitioners[1] have sought review has prompted this Court to seek briefing on the question of whether petitioners have standing to maintain this action. The Ninth Circuit specifically addressed this question in *Yniguez I* and found that petitioners have standing to pursue its appeal. *Yniguez I*, 939 F.2d at 731-38.

As a preliminary matter, this Court has previously found that intervenors, so long as they have "a sufficient stake in the outcome of the controversy," have standing to appeal an adverse decision on their own behalf. *Bryant v. Yellen*, 447 U.S. 352, 368 (1980); *see also Diamond*, 476 U.S. 54; *Maine v. Taylor*, 477 U.S. 131 (1986).

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[1] Petitioners are AOE and Robert D. Park, the head of AOE. Because AOE, by itself, has standing to maintain this appeal, this brief will not address whether Mr. Park may separately maintain an appeal.

This Court enunciated the standing requirements for an intervenor in petitioner's position in *Diamond*. That case involved a class challenge to Illinois' 1975 Abortion Law. *Id.* at 57. When the named defendants charged with enforcing the law chose not to petition for review, Dr. Diamond, an intervenor in the action, sought review by this Court. *Id.* at 61. This Court held that Dr. Diamond's interest in seeing laws enforced, and his status as a doctor and a father, *id.* at 64-66, were insufficient to confer standing, and therefore dismissed the appeal for lack of jurisdiction. *Id.* at 56. This Court determined that an intervenor must demonstrate that he meets the requirements to intervene as of right under Federal Rule of Civil Procedure 24(a) and the requirements of Article III in order to pursue an appeal. *Id.* at 69.

Unlike the petitioner in *Diamond* who failed to establish standing, the facts in this case make it clear that AOE has standing to maintain this action. The Ninth Circuit correctly concluded that AOE was entitled to intervene as of right, that is, AOE could "claim an interest relating to the property or transaction which is the subject of the action" and that "the disposition of the action [would] as a practical matter impair or impede the applicant's ability to protect that interest." Fed. Rule Civ. Proc. 24(a)(2). *Yniguez I*, 939 F.2d at 731. AOE has a substantial interest in the "transaction" involved in the present litigation, that interest being its close relationship with the existence of Article XXVIII itself. Further, because Arizona state officials refused to defend the law, intervention by AOE was the only available avenue by which the people of Arizona's interest in the validity of the law they enacted could be protected. Clearly, AOE meets the requirements of Federal Rule of Civil Procedure 24(a)(2) such that it is entitled to intervention as of right. *See also Washington State Building and Construction Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir.), *cert.*



*denied*, 461 U.S. 913 (1982) (public interest group which sponsored initiative was entitled to intervention as of right under Federal Rule of Civil Procedure 24(a)(2)).

Finding that a party is entitled to intervention as of right, alone, however, "does not confer standing sufficient to keep the case alive" unless the party can also meet the requirements of Article III. *Diamond*, 476 U.S. at 68.

> Article III of the Constitution limits the power of federal courts to deciding "cases" or "controversies."
>
> ....
>
> [T]he decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." ... It is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests."

*Id.* at 61-62 (citations omitted). Unlike Dr. Diamond who defended the Illinois Abortion Law merely as a citizen and physician, AOE has invested its time and effort in drafting Article XXVIII as well as getting it on the ballot and supporting its passage. AOE is more than a "bystander" to the contested legislation. As the Ninth Circuit stated in considering the matter:

> The official sponsors of a ballot initiative have a strong interest in the vitality of a provision of the state constitution which they proposed and for which they vigorously campaigned. The district court's decision striking down Article XXVIII essentially nullified the considerable efforts AOE

> made to have the initiative placed on the ballot and to obtain its passage.

*Yniguez I*, 939 F.2d at 733.

This Court has previously allowed an intervenor to seek review of a federal court's invalidation of state law. In *Maine*, the State of Maine invoked 28 U.S.C. § 1254(2), which authorized an appeal of right "by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States," in order to defend its state law. *Maine*, 477 U.S. at 133. In that case, an individual sought dismissal in a federal court of a criminal indictment based on Maine law. The District Court denied the dismissal, but the Court of Appeals for the First Circuit reversed. When the United States decided not to appeal, the State of Maine intervened. In upholding Maine's standing to pursue the appeal, this Court stated:

> Maine's stake in the outcome of this litigation is substantial: if the judgment of the Court of Appeals is left undisturbed, the State will be bound by the conclusive adjudication that its import ban is unconstitutional.

*Maine*, 477 U.S. at 136. Although AOE cannot similarly invoke an appeal of right, the considerations cited above which militated in favor of finding that Maine had Article III standing are relevant here. A federal court has nullified a state constitutional provision. As in *Maine*, because a named defendant in the present litigation has foregone appeal, the party with the greatest stake in the outcome of the litigation will be bound by a decision in which it had no opportunity to participate. AOE is in fact the only party that "ensures the presence of the 'concrete adverseness which sharpens the



presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Diamond*, 476 U.S. at 62 (citation omitted). Under these facts, AOE has established the presence of the case or controversy required to confer Article III standing.

### B. Petitioner's Position Is Directly Analogous to "Legislative Standing" Previously Recognized by This Court

In one sense, as the Ninth Circuit opined, AOE's position as sponsor of Article XXVIII is analogous to that of a legislature to legislation. *Yniguez I*, 939 F.2d at 733. This Court early recognized the concept of "legislative standing" in *Coleman v. Miller*, 307 U.S. 433 (1939). In finding that state legislators had standing, this Court held that "these senators [challenging the lower court holding] have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman*, 307 U.S. at 438. Accord, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974); *Government of Virgin Islands v. Eleventh Legislature of Virgin Islands*, 536 F.2d 34 (3d Cir. 1976); *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1984), *rev'd on mootness grounds*, *Burke v. Barnes*, 479 U.S. 361 (1987); *but see Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975). In addition, in *Karcher v. May*, 484 U.S. 72 (1987), this Court implicitly acknowledged the standing of the New Jersey State Legislature to pursue an appeal in defense of legislation that it had passed.

*Karcher* involved a statute requiring New Jersey primary and secondary schools to hold a period of silence at the beginning of each school day, which the state legislature passed over the governor's veto. Because the executive department officials chose not to defend the statute, two legislators, Karcher and Orechio, in their official capacities

as Speaker of the General Assembly and President of the Senate, intervened on behalf of the legislature to defend the constitutionality of that law. *Karcher*, 484 U.S. at 75. Although the two legislators in that case later lost their standing by virtue of losing their positions in the New Jersey State Legislature, this Court acknowledged that the legislature itself had standing to intervene to defend the law they had passed where the named defendants, who were executive department officials, declined to defend the statute in question. *Karcher*, 484 U.S. at 81.

As sponsor of the initiative which created Article XXVIII, AOE is in a position similar to that of the petitioners in *Karcher*. Arizona's Governor Mofford, a critic of Article XXVIII and the only defendant at the District Court, similarly chose to forego an appeal. *Yniguez III*, 69 F.3d at 926. As the organization that brought about the enactment of Article XXVIII and the sole party willing to defend the vote of the citizens of Arizona, AOE should be found to have standing to defend the constitutionality of the law it was instrumental in enacting.

### C. Denying Petitioner Standing Will Eviscerate the State-Granted Initiative Power

Article IV, Section 1, of the Arizona Constitution reserves to the people of Arizona the power to "propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature." The law in question is one that the people of Arizona, by initiative, passed. Article XXVIII itself gives "a person who resides in or does business in this State ... standing to bring suit to enforce this Article in a court of record of the State." Art. XXVIII, § 4. While "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a



federal court," *Allen v. Wright*, 468 U.S. 737, 754 (1984), in the absence of some right to standing recognized in the people themselves, the power granted to the people of Arizona in Article IV, Section 1, of the Arizona Constitution will be essentially nullified *unless some governmental branch or official concurs in the law as passed*. This is directly antithetical to the very concept of the initiative power. As the Ninth Circuit pointed out in *Yniguez I*,

> the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative; for better or worse, the people generally resort to a ballot initiative precisely because they do not believe that the ordinary processes of representative government are sufficiently sensitive to the popular will with respect to a particular subject.

*Id.* at 733. Here, of course, the party seeking to defend the law in question is more than merely a random citizen purporting to represent the will of the people, but the association which sponsored the initiative.

Further, the fact that Article XXVIII grants standing to Arizona residents to enforce its provisions also militates in favor of finding Article III standing. In *Karcher*, this Court refused to vacate lower federal court decisions on the basis that the intervenor-defendants in that case lacked standing. This Court held that "[s]ince the New Jersey Legislature had authority *under state law* to represent the States's interest ... we need not vacate the judgments below for lack of a proper defendant-appellant." *Karcher*, 484 U.S. at 82 (emphasis added).

The officials of the State of Arizona who are charged with enforcement of Arizona law have entirely abandoned

any effort to defend the law in question. Denying standing to AOE will have serious implications as to whether initiatives in general can be entirely nullified through the indifference or hostility of a single state official who declines to defend a state law or constitutional amendment enacted by initiative. Standing should be conferred on AOE because its position can be depended upon to fairly and accurately reflect the intent of the people in proposing and passing the law. AOE has a vested interest, as does every private association seeking to utilize the initiative power, not only in "maintaining the effectiveness of their votes," *Coleman*, 307 U.S. 433 at 438, but in maintaining the effectiveness of its members' substantial investment of time and effort.

As was accurately pointed out by the Ninth Circuit when confronted with the procedural complexities before it:

> While the people may not always be able to count on their elected representatives to support fully and fairly a provision enacted by ballot initiative, they can invariably depend on its sponsors to do so.

*Yniguez I*, 939 F.3d at 733. If AOE is denied standing, enactments passed by initiative are subject to nullification by executive fiat.

## II

## THERE IS NO CASE OR CONTROVERSY WITH RESPECT TO RESPONDENT YNIGUEZ

### A. Ms. Yniguez' Nominal Damages Claim Is Not Sufficient to Confer Standing

As noted above, Article III of the Constitution limits federal court jurisdiction to "cases" or "controversies."



Respondent Yniguez' standing in the present action depends upon whether she can demonstrate that there exists a live case or controversy that has not been mooted. Because Ms. Yniguez voluntarily resigned from her position with the State of Arizona in 1990, *Yniguez III*, 69 F.3d at 926, she is not presently subject to Article XXVIII's requirements. *Yniguez II*, 975 F.3d at 647.

For parties invoking federal court jurisdiction, under this Court's precedents

> the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally-protected interest which is (a) concrete and particularized ... and (b) "actual or imminent, not 'conjectural' or 'hypothetical'" .... Second, there must be a causal connection between the injury and the conduct complained of .... Third, it must be "likely," as opposed to merely "speculative," that the injury "will be redressed by a favorable decision."

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). At the time Ms. Yniguez instituted this suit, she met these standing requirements: As a state employee, she could allege that Article XXVIII's restrictions created a "chilling effect" on what she characterized as her right to free speech under the First Amendment, and that she could be subject to discipline if she chose to exercise that perceived right. *Yniguez III*, 69 F.3d at 924. Ms. Yniguez' voluntary resignation from state employment negates the presence of any of the necessary elements to confer standing. Moreover, the Ninth Circuit's attempt to confer standing upon

respondent because her constitutional claims might entitle her to an award of nominal damages must fail.

In her complaint, Ms. Yniguez sought an injunction against enforcement of Article XXVIII, as well as declaratory relief that the provision was in violation of the federal Constitution as well as federal civil rights laws. *Yniguez III*, 39 F.3d at 925. Respondent did not specifically seek nominal damages, yet inserted in her complaint a request for "all other relief that the Court deems just and proper under the circumstances." *Yniguez II*, 975 F.3d at 647 n.1.

This Court has held that "as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 442 (1984). In addition, this Court has found that a claim for damages still extant, despite the fact that other issues have been mooted, is sufficient to find the existence of a live case or controversy. *Powell v. McCormack*, 395 U.S. 486, 497 (1969) (claim for damages of elected Congressman who had not been seated in 90th Congress saved case from mootness when he was subsequently seated in 91st Congress); *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 8 (1978) (plaintiff's claim for damages saved case from mootness where defendant had ceased allegedly unconstitutional practice); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989) (expiration of city ordinance did not moot appellee's constitutional challenge to ordinance where appellee could claim damages).

While these cases stand for the proposition that a claim for damages can preserve a case or controversy, here, Ms. Yniguez' claim for nominal damages is insufficient to confer standing. Ms. Yniguez never specifically sought nominal damages, nor appealed the District Court's implicit



denial of any damages, until after the state had suggested that the case be dismissed as moot. *Yniguez II*, 975 F.3d at 647 n.2. In an attempt to salvage Ms. Yniguez' standing, the Ninth Circuit, *sua sponte*, stated that "plaintiff's constitutional claims *may entitle her* to an award of nominal damages." *Id.* at 647 (emphasis added). Essentially, the Ninth Circuit created the existence of the nominal damages issue to save the case from mootness by specifically inviting Ms. Yniguez to raise the issue in some future cross-appeal. *Id.* at 647 n.2. Because Ms. Yniguez never preserved a claim for nominal damages, her claim now should not be allowed as a subterfuge for gaining standing where no valid basis for standing exists.[2]

### B. Ms. Yniguez May Not Utilize Third Party Standing to Assert the Rights of Others Not Before the Court

As a general matter, "this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. at 499. The general proscription against granting third-party standing, however, has been abridged in the area of the First Amendment. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). Specifically, the Court has allowed challenges based upon "facial overbreadth" to be pressed by litigants "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before

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[2] If this Court determines that the Ninth Circuit lacked jurisdiction, amicus respectfully suggests that the decision be vacated. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

the court to refrain from constitutionally protected speech or expression." *Id.* at 612. Further, this Court has allowed a party to bring a facial overbreadth challenge asserting the rights of others

> without regard to the ability of the other to assert his own claims and "'with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'"

*Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. at 957 (citations omitted).

In the present case, Ms. Yniguez "brought her suit in a quasi-representational capacity." *Yniguez II*, 975 F.2d at 648. However, Ms. Yniguez is not automatically entitled to continue the suit on behalf of the state employees still subject to Article XXVIII's restrictions simply because her challenge is based on facial overbreadth.

Despite the broad exception to third party standing created in the area of the First Amendment, this Court has not and cannot exercise jurisdiction in the absence of the basic Article III requirement that there exists a live case or controversy: "'*Given a case or controversy*, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.'" *Munson*, 467 U.S. at 953 (emphasis added; citation omitted). This Court has characterized the broadening of standing for the purposes of a First Amendment challenge as a lessening of *prudential limitations*, not a lessening in general of the Article III requirement. *Munson*, 467 U.S. at 956.



Because Ms. Yniguez does not satisfy the "first element of the standing inquiry ... the 'case' or 'controversy' requirement of Art. III," *Munson*, 467 U.S. at 954, Ms. Yniguez may not raise the rights of other parties not before the Court based on an overbreadth challenge.

## III

## ARTICLE XXVIII DOES NOT VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

Article XXVIII does not purport to ban the use of non-English languages by citizens throughout the State of Arizona. And, contrary to the statement by the Ninth Circuit, it does not even apply to all "persons connected with the government." *Yniguez III*, 69 F.3d at 933. Rather, Article XXVIII's language restrictions apply only to state "officials and employees during the performance of government business." Art. XXVIII, § 1(3)(a)(iv). As such, the applicable First Amendment test, and the test that was applied by the Ninth Circuit in this case, is that applied by this Court pertaining to public employee speech.

This Court enunciated the standards by which government could regulate employee speech in *Pickering*. That case dealt with whether a local school board had violated a teacher's First Amendment rights by discharging him based upon a letter he had sent to a local newspaper. After acknowledging that the state had valid interests in regulating the speech of its employees, this Court announced the relevant test to be applied in determining whether a state employee speech restriction could pass constitutional muster:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen,

> in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

*Pickering*, 391 U.S. at 568. The balancing test defined by *Pickering* has been applied consistently by this Court in public employee speech cases since. *See, for example, Connick v. Myers*, 461 U.S. 138 (1983); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Waters v. Churchill*, 511 U.S. ___, 114 S. Ct. 1878 (1994); *United States v. National Treasury Employees Union*, 513 U.S. ___, 115 S. Ct. 1003 (1995) (*NTEU*). In assessing the speech at issue in this case, relevant considerations are whether: (1) respondent is speaking as a citizen; (2) the speech relates to a matter of public concern; and (3) the state's interest as an employer is outweighed by respondent's interest in engaging in the restricted speech. *Pickering*, 391 U.S. at 568.

### A. The Public Employee Speech Doctrine Does Not Apply Where the Employee Does Not Speak as a Citizen

The cases that have come before this Court under the category of public employee speech have uniformly related to restrictions on speech *not* part of the employee's official functions. In *Pickering*, the Court held this distinction to be significant:

> [Where] the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to



> regard the teacher *as the member of the general public he seeks to be*.

*Pickering*, 391 U.S. at 574 (emphasis added).

Speech restrictions disfavored by this Court have generally involved employee speech outside of an employee's official duties. In *NTEU*, this Court emphasized the importance of the citizen prong of the *Pickering* test: "[W]e have applied Pickering's balancing test only when the employee spoke '*as a citizen* upon matters of public concern.'" *NTEU*, 115 S. Ct. at 1013 (emphasis in original). *NTEU* involved a challenge to a federal law banning honoraria for any "appearance, speech or article" given by a government employee. In finding the ban overbroad, this Court emphasized that the expression at issue

> fall[s] within the protected category of citizen comment on matters of public concern. ... The speeches and articles for which they received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment.

*Id.* at 1013.

In stark contrast, Article XXVIII's non-English restriction applies only where respondent is *not acting as a citizen*, but instead where she *represents the state*. Indeed, Article XXVIII specifically excludes all of respondent's speech as a citizen and is entirely inapplicable except when she is engaged in "the performance of government business." Art. XXVIII, § 1(3)(a)(iv). As this Court stated in *Waters*, "when an employee counsels her coworkers *to do their job in a way with which the public employer disagrees*, her

managers may tell her to stop." *Waters*, 114 S. Ct. at 1886 (emphasis added). Similarly, the State of Arizona may dictate the way in which Ms. Yniguez must perform her state job.

Paradoxically, in the same section in which the Ninth Circuit majority avers that "the government would ordinarily have the authority to determine the tasks that it asks its employees to perform and to dictate the content of the messages that it wishes its employees to communicate to the public," *Yniguez III*, 69 F.3d at 940, the majority concluded that respondent's speech is *more* entitled to First Amendment protection by virtue of the fact that "here the employee is not simply commenting on a public issue but in speaking *is actually performing his official duties*." *Id.* at 939 (emphasis added). This is in direct conflict with the purpose behind asserting individual protected rights, particularly First Amendment free speech rights: Respondent has no personal stake in the speech she is uttering, and she cannot bootstrap official state speech into personal speech by virtue of the fact that government speech frequently relates to matters of public concern. Just last term, this Court announced:

> [W]hen the State is the speaker, it may make content-based choices .... [W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message .... We recognize[] that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.

*Rosenberger*, 115 S. Ct. at 2518-19. Because Article XXVIII explicitly excludes speech as a citizen, the Ninth Circuit's conclusion that the language choice banned by



Article XXVIII is entitled to First Amendment protection is erroneous.

### B. Speech of "Public Concern" Relates to Content, Not the Mode of Expression

The Ninth Circuit misconstrued the "public concern" prong of the *Pickering* balancing test in arriving at its conclusion that respondent's speech constituted speech of public concern. The court concluded that, because the speech related to "the provision of governmental services and information," and was "speech that members of the public desire to hear," *Yniguez III*, 69 F.3d at 940, it was necessarily of public import. This Court has specifically rejected such a notion: "[T]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark ... would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149. Moreover, the desire of the public to receive information in a language they can understand is factually and conceptually distinct from this Court's prior pronouncements about speech of public concern.

In describing the public concern prong in *Pickering*, this Court stated that the "core value of the Free Speech Clause of the First Amendment" was "the public interest in having free and unhindered debate on matters of public importance." *Pickering*, 391 U.S. at 573. This understanding was reemphasized in subsequent public employee speech cases:

> When employee expression cannot be fairly considered as relating to any matter of *political, social or other concern to the community*, government officials should enjoy wide latitude in managing their offices, without intrusive

> oversight by the judiciary in the name of the First Amendment.

*Connick*, 461 U.S. at 146 (emphasis added). Further, in explaining the type of speech entitled to First Amendment protection under the public concern prong of *Pickering*, this Court in *Rankin* referred to the principle announced in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), that "debate on public issues should be uninhibited, robust and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Rankin*, 483 U.S. at 387. In contrast, the speech which the Ninth Circuit has deemed of "public concern" has none of the attributes which this Court has deemed entitled to First Amendment protection. Ms. Yniguez processed insurance claims for the state, *Yniguez III*, 69 F.3d at 924; the content of the "speech" at issue is the communication between her and the members of the public with whom she deals; it has no political or social import. Moreover, even if it did, *Article XXVIII would not ban it*.

The Ninth Circuit blurs the distinction between the medium used--the choice of language--and the message sought to be conveyed--meaningful content of the words. In so doing, the opinion effectively obliterates the public concern prong of the *Pickering* test, instead transforming the public concern about the functioning of government into a public "right to receive" information from the government. *Yniguez III*, 69 F.3d at 941.

The Ninth Circuit relied heavily upon *NTEU* for this proposition. Quoting from *NTEU*, the court stated:

> "The large-scale disincentive to government employees' expression also imposes a significant



> burden on the public's right to read and hear what the employees would otherwise have written and said."
>
> ....
>
> Thus, *National Treasury Employees Union* makes it clear that public employee speech doctrine weighs heavily the public's "right to receive information and ideas" by affording First Amendment protection to speech that the public has an interest in receiving.

*Yniguez III*, 69 F.3d at 942 (citation omitted). But *NTEU* does not declare that the public's desire to hear information elevates that desire, by itself, into an interest entitled to First Amendment protection. Instead, this Court's holding that the ban was overinclusive was based on the finding that Congress had not sufficiently established a nexus between its legitimate interest in avoiding appearances of impropriety, *NTEU*, 115 S. Ct. at 1017, and the fact that the ban reached matters that were *not government related*:

> Because the vast majority of the speech at issue in this case does not involve the subject matter of government employment and takes place outside the workplace, the Government is unable to justify [the ban] on the grounds ... asserted in *Pickering* ....

*Id.* In other words, the ban in *NTEU* went too far because it went beyond the government's legitimate interest in the functioning of the government itself: "[O]ne can envision scant harm, or appearance of harm, resulting from [a government] employee's accepting pay to lecture on the Quaker religion or to write dance reviews." *Id.* In fact,

*NTEU* implied that, had the ban applied to the subject of government employment or the government workplace (as it does in the present case), it would have been upheld regardless of the public's desire to hear the speech at issue.

Because the public's desire to hear speech does not elevate government employee speech to a category of protected speech, the Ninth Circuit was incorrect in concluding that respondent's speech satisfied the public concern prong of the public employee speech doctrine. Unless this Court holds that choice of language, as *sui generis*, is entitled to First Amendment protection, the Ninth Circuit's decision must be reversed.

### C. Arizona's Interest in Unity and Political Stability Is Entitled to Deference by the Federal Judiciary

Under the *Pickering* test, this Court has traditionally balanced the interests of the public employee in expressing his or her own views against the state's interest in "the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The state interest asserted in the present case is not efficiency, but rather "protecting democracy by encouraging 'unity and political stability'; encouraging a common language; and protecting public confidence." *Yniguez III*, 69 F.3d. at 944.

While ostensibly giving credence to the state's asserted interest, the Ninth Circuit ultimately concluded "[w]e cannot agree that Article XXVIII is in any way a fair, effective, or appropriate means of promoting [the state's] interests." *Yniguez III*, 69 F.3d at 946. Unfortunately, its conclusion ultimately dealt less with the weight of the asserted state interest than in passing its own judgment upon whether the state's interests were desirable and whether the means chosen



by the state were the best for serving those interests. In so doing, the Ninth Circuit applied an improper test.

In support of its holding, the Ninth Circuit cited *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which this Court struck a state law which banned foreign language instruction in private schools. The error in the Ninth Circuit's analysis stems from the fact that *Meyer* dealt with a substantive due process challenge, and not a First Amendment challenge. In striking the foreign language instruction ban in *Meyer*, the Court did not say that the state's goal of "foster[ing] a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters" was unimportant or unworthy, only that the state law banning foreign language instruction in private schools to further the state's interest could not withstand due process as applied. *Meyer*, 262 U.S. at 402-03. In other words, the Court applied the classic due process test: Whether the means chosen by the state to promote a state interest were legitimate or arbitrary. Under the public employee doctrine of the First Amendment, however, the proper test is not whether the judiciary favors the means chosen by the state to promote its goal, but whether the state's interest in promoting its goal is outweighed by the employees' First Amendment interest in commenting on matters of public concern. *Pickering*, 391 U.S. at 568.

In fact, contrary to the Ninth Circuit's reading, the *Meyer* Court indicated that the due process considerations which prompted it to strike the ban on private conduct would *not* apply in the context of state conduct:

> The power of the state to ... make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge

> been made of the state's power *to prescribe a curriculum for institutions which it supports.*

*Meyer*, 262 U.S. at 402 (emphasis added). The *Meyer* Court acknowledged that the state had wide latitude to regulate its own conduct with respect to choosing a means to further its goals.

The Ninth Circuit misapplied the state interest prong of the *Pickering* balancing test, treating respondent's First Amendment challenge under the public employee speech doctrine as a due process challenge. Furthermore, the Ninth Circuit's due process conclusion that Article XXVIII is an inappropriate means to serve the asserted state interest was unwarranted, because the precedent it cited related to government regulation of private conduct, rather than regulation of its government affairs. The State of Arizona is seeking only to regulate the conduct of state employees funded entirely by state tax revenues and in the performance of state business; federal courts should defer to the judgment of Arizona to determine what is in that state's interests. The Ninth Circuit's failure to give due weight to the state's interest in promoting unity and political stability should be rebuffed by this Court.

## CONCLUSION

Article XXVIII of the Arizona Constitution restricts the use of non-English languages by state "officials and employees during the performance of government business." Art. XXVIII, § 1(3)(a)(iv). The Ninth Circuit Court of Appeals held that the foreign language ban imposed by Article XXVIII violates the Free Speech Clause of the First Amendment to the United States Constitution.



Article XXVIII relates only to public employee speech. Despite the broad protections afforded to speech by the Constitution, this Court has recognized that the government, as an employer, may properly "regulate the content of what is or is not expressed when it is the speaker." *Rosenberger*, 115 S. Ct. at 2518. Because Article XXVIII of the Arizona Constitution applies only to government speech, and because its ban applies merely to choice of language, it in no way infringes the core First Amendment "interest in having free and unhindered debate on matters of public importance." *Pickering*, 391 U.S at 573. Consequently, this Court should reverse the Ninth Circuit decision.

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(14)

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No. 95-974

# In The Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park
*Petitioners*

v.

State of Arizona; Maria-Kelley F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Writ Of Certiorari to the United States Court of Appeals for The Ninth Circuit

## BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS' POSITION

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## INTEREST OF THIS AMICUS CURIAE

Why this amicus brief? Because the writer was impressed by conversations he had in his youth with two veterans of the Civil War: his grandfathers. He views the Fourteenth Amendment as the keystone to reconstituting the Union, designed to satisfy the eleven northern states that they had not fought in vain, while offering each of the southern states something they could accept with confidence that their sovereignty would not be unduly impaired.

Would the northern states have proposed the amendment if they had thought it meant giving up any of their Tenth Amendment rights? And would the southern states have re-entered the Union if they had thought the price included forfeiture of their protection under the reservation of powers the Tenth Amendment seemed so clearly to furnish? How could they possibly have foreseen the doctrine of "incorporation," or "assimilation," coupled to such an extension of "freedom of speech"?

This brief attempts to illumine the law of the constitution from the **linguistic** aspect. This is novel. Integrity of the language has been the writer's lifetime interest. Accordingly, the argument will lean heavily on 18th and 19th century practices in verbalization. How were the words and phrases, as then used, understood by the congress, and by the conventions and state legislatures that ratified the amendments?

The linguistic approach is simple. Words are supreme. How were they read and heard and

understood at the time by the people **generally** who read and heard them and who intended to govern and be governed by them?

Two eras are involved: the eighteenth century, for which we must depend upon modern computer technology, and the eighteen sixties, when the 1864 Webster's American Dictionary of the English Language became almost an official government publication. This method of analysis leads to the conclusion that it is not the First Amendment that controls (as contended the appellee), but the Tenth. At issue is the balance between the national power and that of the states.

## I. "FREEDOM OF SPEECH" IS A PHRASE OF DOUBTFUL MEANING.

To make her case, Ms. Yniguez must show that Article 28 of the Arizona state constitution somehow abridges "the freedom of speech" protected against Congressional abridgment by Article 1 of the federal constitution.

"The freedom of speech" is not a comprehensible phrase generally understood to signify some one identifiable concept. From the beginning our choices have been limited. We might have ignored it altogether as being unconstitutionally vague. Alternatively, we can now attribute to it the narrowest significance justifiable to the greatest number of people affected. That in short seems the view that the phrase does away with prior restraint in trials for seditious libel. To the extent we have gone further, a reappraisal is timely and this case from Arizona is a fitting vehicle.



Professor Leonard W. Levy in 1960 was clearly of the opinion that:

> we do not know what the First Amendment's freedom of speech-and-press clause meant to the men who drafted and ratified it at the time[s] that they did so.

He himself felt it "embodied the Blackstone definition and left the law of seditious libel in force," not that it superseded the common law. Leonard Levy, Legacy of Suppression, The Belknap Press of Harvard University Press, 1960, pages 247 and 248.

Surely "the freedom of speech" does not eliminate perjury in the federal courts or before the Congress. Nor can it be supposed to do away with the Judeo-Christian prohibition "Thou shalt not bear false witness against thy neighbor." (Deuteronomy 4, 13; St. Matthew 22, 36.) The phrase is not an absolute, and its application must therefore be confined to the minimum limits required to give it any significance at all. Even congress has not dared to go further under the "necessary and proper" clause. The Court below, however, has undertaken to sit as a "Committee on Revision" and rewrite the Constitution, oblivious to the rejection of any such idea during the convention at Philadelphia. (Documents of the Constitution, Government Printing Office, 1938, page 548)

Modern technology (specifically, computers tied to huge data bases) has enabled powerful lexicographers to search the past in depth and in breadth to furnish new insights into old laws. Thus in the 1987 edition of

the Random House Dictionary of the English Language, page 763, we find this definition of freedom of speech:

> the right of people to express their opinions publicly without interference, subject to the laws against libel, insurrection, violence, or rebellion, etc. Also called free speech. (1940-45)

That is indeed how the words were commonly understood in the pre-constitution era. Two state constitutions tied speech to "**sentiments**." The Pennsylvania constitution of September 28, 1776 (Article 12) declared: "That the people have a right to freedom of **speech** and of writing, and publishing their **sentiments**; therefore, the freedom of the press ought not to be restrained."

The Vermont constitution of July 4, 1786 (Article 15) declared:

> That the people have a right of freedom of **speech** and of writing and publishing their **sentiments**, concerning the transactions of government - and therefore the freedom of the press ought not to be restrained.

And in Article 16:

> The freedom of deliberation, **speech**, and debate, in the legislature, is so essential to the rights of the people, that it



> cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.[1]

**Sentiment** is thus defined in Webster's American Dictionary of the English Language (1828):

> 2. In *a popular sense,* thought; opinion; judgment; the decision of the mind formed by deliberation or reasoning. Thus in deliberative bodies, every man has the privilege of delivering his *sentiments* upon questions, motions and bills. (Italics in original.)

The first congress in 1789 did in fact consider - but rejected - a proposal to forbid states from infringing freedom of speech. The history is set out in "Creating the Bill of Rights: the Documentary Records from the First Federal Congress" published by Johns Hopkins University Press in 1991. Proceedings in the House committee of the whole are reported on page 188, proposing to insert "no **state** shall infringe the equal rights of conscience, nor the freedom of **speech**, or of the press, nor of the right to trial by jury in criminal cases."

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[1] Thurston Greene, The Language of the Constitution (A Sourcebook and Guide to the Ideas, Terms, and Vocabulary Used by the Framers of the United States Constitution) (with foreword by Warren E. Burger), pages 801-802. This book was contributed by the author of this brief to honor the Bicentennial of the United States Constitution in1991.

As presented to the Senate on September 4, 1789, however, the proposal read:

> that **Congress** shall make no law abridging the freedom of **speech** or the right of the People peaceably to assemble and consult for their common good and to petition the government for a redress of grievances.[2]

That was passed. Somewhere along the way, the proposal respecting the states faded away. Nor should it be revived without amending the Tenth Amendment.

Recently, in a less linguistically minded world, there have been deviations from the earlier simplicity. Perhaps an excess of enthusiasm has converted into a legal aphorism what began as no more than a catchword, a concept of uncertain content, an abstraction, a figure of speech. Congress has not attempted a broader definition. In consequence, "freedom of speech" (but for the Pennsylvania and Vermont constitutional usages above-quoted) is no closer to being a legal aphorism than the "freedom of the seas" slogan that played so important a part in precipitating our entry into the first world war upon the sinking of the Lusitania.

Ms. Yniguez's activities fall wide of the mark she strives to score on.

[2] Documentary History of the First Federal Congress, Vol. I, Johns Hopkins University Press (1972), page 153.



## II. THE FOURTEENTH AMENDMENT OFFERS NO HELP TO MS. YNIGUEZ.

The 39th Congress made no effort to revive the proposal that "abridgment of freedom of speech" be extended to the states (supra, pages 5 and 6). Nor were any of the "abridgment" restrictions extended to the states through incorporation **by reference**, although linguistically it would have been easy to do so. Two old rights were reworked: "due process" and "privileges and immunities."

### 1. Due Process

The "due process" clause was repeated verbatim, with the prohibition on abridgment being made expressly applicable to the states. The term "due process" was not invented in Philadelphia. Except for the specific enumeration of protections, it could have meant no more, no less than what it meant in the plain language of the English Petition of Rights in 1628.

> [N]o man of what estate or condition that he be, should be put out of his lands, nor tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law.[3]

This was a substantive right to a procedural safeguard. Two hundred sixty years later this great bulwark against oppression stood unaltered, reaf-

[3] See Thurston Greene, op. cit., page 222.

firmed, its scope extended. But Ms. Yniguez has suffered none of the evils those words protect her from.

In his Commentaries, William Blackstone set out much of what was to become our Bill of Rights, using interchangeably the terms "due **process** of law" and "due **course** of law" and "law of the **land**." After citing a statute of 28 Ed. III "that no man shall be put to death without being held to answer by due **process** of law," he declares:

> Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due **course** of law. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and, that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter is, that no freeman shall be taken or imprisoned, [131] but by the lawful judgment of his equals, or by the law of the **land**. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king, or his council, unless it be by legal indictment, or the **process** of the common law.[4]



Ms. Yniguez's rights of freedom of speech – whatever those "rights" may be – were certainly not abridged by any violation of due process. By act of the people of Arizona, acting through the process of direct initiative, she has been kept from flouting the settled practice of her Arizona fellow citizens to conduct public business in English like all her fellow Americans. Even if this were subject to procedural safeguards of "due process," what "process" could be more "due"?

Since ratification of the Fifth Amendment in 1791, the only **constitutional** change in "due process" has been the Fourteenth Amendment. There are volumes of law, at both federal and state levels, indexed under "due process." But this is the law of the courts, not of the constitution, and therefore can be changed with no resort to the amendment process.

## 2. "Privileges and Immunities"

Ms. Yniguez claims no particular status or position that qualifies her for preferred treatment

[4] Blackstone, Vol. 1, pages 130-131, University of Chicago Facsimile of the First Edition of 1765-1769

within the "privileges and immunities" provisions of either 1789 or 1868.

Article IV, section 2 of the constitution provides:

> The Citizens of each **State** shall be entitled to all Privileges and Immunities of citizens in the several states.

The Fourteenth Amendment is a corollary:

> No **State** shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Taken together, these two provisions facilitate movement across state lines without fear of recrimination. Now citizens can move as freely as could those to whom "privileges and immunities" were previously granted. But two questions are left unanswered. First: who were the original recipients? It was the few, not the many. The very concept of a privilege (for the **few**) is something not available to the **many**: in 1492, Christopher Columbus from King Ferdinand and Queen Isabella of Spain. In 1609, the Treasurer and Company of Virginia from James I. From Charles I in 1620, The Council of the Colony of Plymouth and the Council of the Massachusetts Colony in 1629; also to Sir Robert Heath for all churches in the county palatine of Durham, England. In 1640, from Charles I to the Bishop of Durham and the Province of Maine. In 1665, from Charles II, all churches in Carolina to the Bishop of Durham, England. In 1676, to the proprietors of New Jersey from James I to the Duke of York, and from Charles



II in 1681 to William Penn, the Province of Pennsylvania.[5]

The Continental Congress in 1774 declared that the English colonies were "entitled to all the immunities and privileges granted & confirmed to them by royal charters, or secured by their several codes of provincial laws."[5]

The Articles of Confederation (1777) not only granted "privileges and immunities" to citizens of all states, but also (as though in addition) "free ingress and egress" across state lines. Alexander Hamilton (ever the litigator) saw "privileges and immunities" as grounds for diversity jurisdiction in the federal courts (Federalist Papers 11, 12). The Massachusetts constitution of 1780 declared that the President and Fellows of Harvard College "should have all the privileges and immunities" they then had.[5]

The answer to the above question on the identity of the initial privileged persons leads to a second question, which is necessarily in two parts. The first part is: how was "privileges and immunities" understood in 1789 when the constitution was ratified? The second part is: how were those very same words understood in 1868 when the Fourteenth Amendment was ratified?

We have two dependable lexicographical sources: The Encyclopedia Britannica of 1771 and Noah Webster's dictionary of 1828 (after the event, but proximate). The definitions are:

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[5] For compilation of appropriate quotations relating to the above paragraphs, see Thurston Greene, op. cit., pages 602-612.

Encyclopedia Britannica:

> **Privilege**, in law, some peculiar benefit granted to certain persons or places, contrary to the usual course of the law. Privileges are said to be personal or real. Personal privileges are such as are extended to peers, ambassadors, members of parliament and of the convocation, and their menial servants, etc.
>
> **Immunity**, a privilege or exemption from some office, duty, or imposition, as an exemption from tolls, etc. Immunity is more particularly understood of [sic] the liberties granted to cities and communities.

Webster's American Dictionary of the English Language (1828):

> **Privilege**. 1. A particular and peculiar benefit or advantage enjoyed by a person, company or society, beyond the common advantages of other citizens. A privilege may be a particular right granted by law or held by custom, or it may be an exemption from some burden to which others are subject. The nobles of Great Britain have the *privilege* of being triable by their peers only. Members of parliament and of our



> legislatures have the *privilege* of exemption from arrests in certain cases. The powers of a banking company are *privileges* granted by the legislature. 2. Any peculiar benefit or advantage, right or immunity, not common to others of the human race. Thus we speak of national *privileges*, which we enjoy above other nations. We have ecclesiastical and religious *privileges* secured to us by our constitutions of government. *Personal privileges* are attached to the person; as those of ambassadors, peers, members of legislatures, *etc*. *Real privileges* are attached to place; as the *privileges* of the king's palace in England. 3. Advantage; favor; benefit.
>
> **Immunity**. 1. Freedom or exemption from obligation. To be exempted from observing the rites or duties of the church, is an *immunity*. 2. Exemption from any charge, duty, office, tax or imposition; a particular privilege; as the *immunities* of the free cities of Germany; the *immunities* of the clergy. 3. Freedom; as an *immunity* from error. (Italics in original.)

By the time the Fourteenth Amendment was adopted in 1868, we had fuller definitions in Webster's 1864. About that dictionary, it was claimed:

> But far more important, though less spectacular, was the acceptance of Webster in publishing offices, courts, legislatures, schools, business houses, and other official and semiofficial centers of usage. The Government Printing Office itself hung up signs for its editors, compositors, and proof-readers, "FOLLOW WEBSTER." New York newspaper practice, shortly followed by that of the rest of the country, centered around Webster. Textbook publishers issued millions of copies of schoolbooks based on Webster. The *Atlantic Monthly* (under Howells) followed Webster in the very heart of Boston.
>
> The West Point cadets were furnished with a copy of Webster for each room — and required to keep it in good condition. Schools in state after state and city after city (prodded by a well-organized "adoption campaign" from Springfield) standardized on Webster. Legislatures made Webster their



> authority by resolution, and courts followed this lead, **right up to the Supreme Court of the United States.** (Emphasis added.) In every executive department of the Federal Government Webster was the authority.
>
> As early as the end of 1870, indeed, the *New York Tribune* could report with literal truth, "The *Unabridged* is generally regarded as the dictionary of highest authority in the language, and has a sale all over the civilized world. It is regularly issued in London, and in English, as well as American Courts of Justice, is considered as the leading authority on the meaning of words.[6] (Italics in original.)

The definitions in the 1864 Webster's was as follows:

> **Privilege**, n. A peculiar benefit or advantage; a right or immunity not enjoyed by others or by all; special enjoyment of a good, or exemption from an evil or burden; prerogative; advantage. *Question of privilege*

[6] Noah's Ark by Robert Keith Leavitt, a house publication of G. & C. Merriam Company in celebration of their first hundred years of dictionary publication, 1947.

*(Parliamentary Usage),* a question which concerns the security of a member of a legislative body in his special privileges as such. — *Water privilege,* the advantage of a water-fall in streams sufficient to raise water for driving water-wheels, or a place affording such advantage. [*U.S.*] — *Writ of privilege (Law),* a writ to deliver a privileged person from custody when arrested in a civil suit, *Blackstone.* Syn. — Prerogative; immunity; franchise; right; claim; liberty. — Privilege, Prerogative. *Privilege,* among the Romans, was something conferred upon an individual by a private law; and, hence, it denotes some peculiar benefit or advantage, some right or immunity, not enjoyed by the world at large. *Prerogative,* among the Romans, was the right of voting first; and, hence, it denotes a right of precedence, or of doing certain acts, or enjoying certain privileges, to the exclusion of others. It is the *privilege* of a member of Congress not to be called in question elsewhere for words uttered in debate. It is the *prerogative* of the president to ratify treaties, with the consent of the Senate. It is the *prerogative* of a parent to govern and direct his offspring.



> **Immunity,** n. 1. Freedom from an obligation; exemption from any charge, duty, office, tax, or imposition; a particular privilege; as, the *immunities* of the clergy. Granting great *immunities* to the commons, they prevailed so far as to cause Palladius to be proclaimed successor. (Italics in original.)

The two words are used quite differently today, doubtless reflecting, as lexicographers must, changing usage. A good example is the fifth definition of privilege in the 1987 Random House dictionary:

> 5. any of the rights common to all citizens under a modern constitutional government: *We enjoy the privilege of a free people.* (Italics in original.)

That is hardly the way the word was understood in 1868. Laws have to be written in contemporaneous (not futuristic) words. They cannot be amended by changing the usage later.

A "qualified" statement used to mean one that is modified or limited or restricted in some way, such as a "qualified endorsement." Today (as used in federal tax legislation), "qualified" means an act (such as a waiver) that is **un**qualified in any way. "This" used to mean (as in frontier dialect) "this-here" and "that" used to mean "that-there." Today they have been reversed. A "gifted" child used to be one born with a certain talent; today "gifted" has replaced "given" as the past participle of the verb "to give," and we

speak of property that has been "gifted." Employees used to be "discharged"; now they are "terminated" meaning, it must be supposed, that their employment is terminated. In federal statutory language, we now "gross up" (instead of "mark up") the value ascribed to certain assets, and we "grandfather" (now a verb) pre-existing conditions in order to avoid retroactivity of laws. Recently we have been using the word "perception" when we used to use "understanding." "Terrific" has come to mean "splendid," while only a short while ago it meant something that struck terror, like a stroke of lightning. "Awful" is no longer an adjective meaning to inspire with wonder; now it is merely an intensive adverb. Modern dictionaries are replete with definitions marked "obsolete," and those marked "colloq." a while ago now appear shorn of that degrading adjective, and are at last accepted in respectable linguistic society. The use of quotation marks to indicate the author's disavowal of a word's use has been largely abandoned and the misused word thus invested with legitimacy until "liberated" means "conquered" and "politically correct" means whatever the user wants it to mean.

As put by Judge Learned Hand (sitting at nisi prius in Hotchkiss v. National City Bank of New York in 1911, 200 Fed. 287 at 293 [5]), in a case involving the interpretation of a brokerage contract:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words,



> which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, **he would still be held**, unless there were some mutual mistake, or something else of the sort.

As reported in the Year Books: "It is a trite learning that the thought of man is not triable, for the devil himself knows not the thought of man." (Brian, in YB 17 Edw. IV, 1, quoted by Judge Hand, supra page 18.)

## CONCLUSION

We need but look about us to see the folly of Ms. Yniguez's position. To our north, Canada faces fragmentation because a three-to-one majority in the Province of Quebec, having imposed the French language on the English-speaking minority, now threatens separation from the rest of Canada if its demands for near-independence are not met. To the southeast we hear cries from Puerto Rico for statehood with Spanish vernacular freedom. To the west we see our largest state rapidly becoming polyglot. If we look half way around the globe, we see India, the largest self-governing nation in the world, rent with dissension with fourteen different languages being recognized by its constitution. At the same time, by natural forces English has become the international language of foreign trade, aviation,

travel, and diplomacy through natural evolution, not by fiat.

The biblical city of Babel was one "where construction of a tower intended to reach heaven was ended when the builders became unable to understand each other's language."[7] Our historical counterweight was Noah Webster's "Blue-Book Speller" that sold more than seventy million copies in the nineteenth century.[8] It enabled immigrants of whatever nationality to speak not just to each other, but to immigrants from other lands, in their new common language. There was nothing they could not build — including the American culture itself.

Will the Tower of Babel prevail over Noah Webster? It might, unless linguistic divergence comes to an end.

The Ninth Circuit Court of Appeals decision should be reversed.

Respectfully submitted:

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[7] American Heritage College Dictionary, Third Edition, 1993.
[8] Noah's Ark by Robert Keith Leavitt, op. cit., page 6.

# APPENDIX

## APPENDIX

The following argument is appended lest the court take under consideration, sua sponte, the application of the "equal protection" provision of the Fourteenth Amendment.

### Equal Protection of the Laws

This was the only new right furnished by the Fourteenth Amendment. The adjective "equal" is self-defining. But what is it to "protect" a right? The word appears nowhere else in the constitution.[9] But in 1868 when the amendment was ratified, as well as in 1866 when the 39th Congress debated it, we had the 1864 Webster's dictionary which defined it clearly thus: "To cover or **shield** from danger or injury; to **defend**; to **guard**; to **preserve** in safety." The law that protects one protects all: rich or poor, sick or well, better or worse, anglophone or not, citizen or non-citizen. No state may "deny to any person within its jurisdiction" whatever protection is afforded to any other person by state law. Clearly any rights bestowed, beyond this clear-cut statement on **protection**, must follow the normal procedure governing the legislatures of the several states. Without the amendment, many of the evils for which the civil strife of 1860-1865 was endured would have come to naught. Yet the stricture was not so severe but that the nine southern states could accept it as a condition to readmission. The wording displays a

[9] See "The Exhaustive Concordance to the United States Constitution" by Dennis Buzzocco, Firm Foundation Press, Chattanooga, TN, (1994).

careful balance between the ideal of those unionists who may have wished for more, and their realization that to have asked for more might have jeopardized their hope of getting anything.

Even if Ms. Yniguez could show that "speech" (as she uses the term) is a freedom somehow protected under Article I, she has not made a case under "equal protection." To have done so, she would have had to show that her language (Spanish) had been singled out from all other foreign languages to be denied acceptability under the Arizona law. That did not happen. Our native language and that language only was protected. That language protects us all – including Ms. Yniguez herself.

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No. 95-974

IN THE

# Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,

*Petitioners,*

v.

State of Arizona; Maria-Kelley F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering,

*Respondents.*

On Writ Of Certiorari to the United States Court of Appeals for The Ninth Circuit

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF VACATING OR REVERSING JUDGMENT ENTERED BELOW

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF VACATING OR REVERSING THE JUDGMENT BELOW

COMES NOW U.S. English Inc. ("U.S. English"), by counsel, pursuant to Supreme Court Rule 37, and moves this Court for leave to file a brief *amicus curiae* in support of vacating or reversing the judgment below. In support of this motion, U.S. English states as follows:

1. U.S. English has approximately 600,000 members nationwide, and worked to obtain enactment of Article XXVIII of the Arizona Constitution (the "Arizona Amendment") at issue here.

2. U.S. English filed briefs *amicus curiae* in the Court of Appeals in this case, and also filed a brief *amicus curiae* in support of the Petition for Certiorari which was granted by this Court on March 25, 1996.

3. U.S. English is currently promoting legislation similar to the Arizona Amendment in numerous other jurisdictions, including H.R. 123 in the U. S. Congress, and this case will have an important affect on such legislation. See J. A. 153-155.

4. This Court has asked the parties to brief the issue of whether this case is moot as to plaintiff-respondents Yniguez and Guiterrez.

5. We understand that Petitioners' brief will not focus on the issue of whether this case is moot. The *amicus brief* submitted by U.S. English discusses the issue of mootness in detail, in light of the State of Arizona's official position that the Arizona Amendment only applies to "official acts," and in light of the fact that neither plaintiff-respondent Yniguez or Gutierrez is currently employed by the State of Arizona.

6. Another threshold issue in any case before this Court is the scope of the Court's power of constitutional adjudication.

7. The Petition discussed briefly the principle of constitutional adjudication that the Arizona constitutional provision in issue must be given all reasonable constructions in order to save it from facial invalidation. The *amicus curiae* brief submitted by U.S. English discusses this principle in greater detail, especially as applied to the Constitutional provision here, which was enacted by initiative.

8. The *amicus curiae* brief submitted herewith also discusses in greater detail the authoritative construction of the Arizona Amendment in issue, and the error of the lower in ignoring this construction. A copy of the formal Opinion of the Attorney General is printed in the Joint Appendix.

9. Barnaby W. Zall, Esq., counsel for Petitioner Arizonans for Official English, does not consent to this motion.

10. All other parties consent to this motion.

WHEREFORE, it is requested that the Court issue an order granting U.S. English leave to file the attached *amicus curiae* brief in support of Petitioner.

Respectfully submitted,

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

U.S. English is a national nonprofit organization with over 600,000 members. Its purpose is to promote legislation and programs to establish English as the official language of governments.

U.S. English has a substantial interest in this litigation because it involves the constitutionality of Article XXVIII of the Arizona Constitution, entitled "English as the Official Language" (the "Amendment"). U.S. English assisted in the initiative which resulted in the Amendment, filed briefs in the Court of Appeals below, filed a brief in support of the Petition for Certiorari, and is currently promoting official English statutes in Congress and other states.

Any meaningful official English statute must necessarily employ broad language and rely heavily on administrative interpretations and implementations by attorneys general or other administrative officials. The lower courts' refusal to give effect to the Amendment's construction by the Arizona Attorney General, and their facial invalidation of the Amendment, will make it extraordinarily difficult to fashion similar legislation in other jurisdictions if the opinion below is allowed to stand.

U.S. English respectfully submits that this case is moot and the judgment below should be vacated. Assuming, however, that the Court reaches the merits of this case, U.S. English respectfully submits that Judge Reinhardt's majority opinion below is in direct conflict with prior decisions of this Court which held that facial invalidation is not appropriate, where, as here, the challenged provision has a broad range of plainly legitimate applications. The lower courts should have adopted the careful opinion of the Arizona Attorney General which narrows the scope and impact of the Amendment and cures all constitutional concerns.

## FACTS

In October of 1987, Arizonans for Official English ("AOE") initiated a petition drive which culminated in the 1988 passage by ballot initiative of Article XXVIII of the Arizona Constitution, entitled "English as the Official Language" (the "Amendment"). J. A. 158.

At the time the Amendment was adopted by the voters of Arizona, Plaintiff-Respondent Yniguez was employed by the Arizona Department of Administration, where she handled medical malpractice claims asserted against the state. *Id.* at 159. Yniguez communicated in Spanish with mono-lingual Spanish-speaking claimants, and used a combination of English and Spanish with bilingual claimants. *Id.* at 47. Yniquez also drafted various settlement documents, some in English and/or Spanish. *Id.* at 48. After the passage of the Arizona Amendment, however, Yniguez ceased speaking Spanish on the job for fear that her use of Spanish made her vulnerable to disciplinary measures. *Id.* at 159.

In November of 1988, Yniguez filed this lawsuit against the state of Arizona and various state officials. *Id.* Yniguez' complaint was later amended to add Plaintiff-Respondent Gutierrez, a state senator who desired to speak Spanish to his Hispanic constituents. *Id.* at 56-57.

Approximately two months after Yniguez initiated this action, the Arizona Attorney General issued a lengthy opinion defining the scope of the Arizona Amendment. *See* Arizona Attorney General Opinion I89-009, reprinted in the Joint Appendix at J.A. 61-76. The Attorney General's opinion made clear that the Amendment's English mandate only applied to "official acts" of the Arizona government, including all "official documents." J. A. 62, 65, 68, 71-72. The Opinion also stated that "provision of non-English assistance, whether written or oral, is permissible, and *is required* if it is necessary to reasonably provide fair and effective services;" that "translation services and accommodating communications are



permissible, *and may be required* if reasonably necessary to the fair and effective delivery of services"; and that generally non-English languages may be used to facilitate "the fair and effective delivery of governmental services" or "when reasonable to facilitate the day-to-day operation of government." *Id.* at 63-64, 71, 72, 73, 74. (emphasis added). In addition, the Opinion concluded that "Communications between elected and other governmental employees with the public at large may be in a language other than English," and that the "State may act in a language other than English . . . to comply with [the United States Constitution and] other federal laws." *Id.* at 62, 74.

During proceedings in the lower courts, the Attorney General's office filed briefs and presented oral argument in which this Opinion was set forth as the official position of the State of Arizona.[1] The district court, however, rejected the Attorney General's opinion and entered a broad declaratory judgment facially invalidating the entire Arizona Amendment. No application of the Amendment was saved.

The State decided not to appeal the district court's decision. Therefore, AOE, as the official sponsor of the Arizona Amendment, sought leave of court to intervene for purposes of pursuing an appeal of the district court's order. J. A. 94. Leave to intervene was granted, and an appeal was filed. *Id.* at 185, 206.

Sometime in 1990 Yniguez voluntarily left state employment. *Id.* at 187. At about the same time, Plaintiff Gutierrez also left State office. The State filed a suggestion of

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[1] In his briefs in the lower courts, the Attorney General repeatedly confirmed that his Opinion is "the official position of the State of Arizona on the proper interpretation" of the Amendment (*e.g.*, Br. of State of Arizona, 9th Cir. No. 93-15719, p. 3, fn. 1), and that the Amendment "app[lies] only to 'official' acts and "official government functions of actions", but not to "[r]outine conversations, instructions and communications with agencies or citizens" (*id.* at 5, 6, 7).

mootness, but the Ninth Circuit held that the case was not moot because Yniguez had a right to appeal the trial court's failure to award nominal damages, even though Yniguez did not specifically request nominal damages in her complaint or at trial. *Id.* at 205. Taking her cue from the Ninth Circuit, Yniguez then filed a cross-appeal requesting nominal damages. *Id.* at 209.[2]

On November 7, 1995, the district court awarded Yniguez $1.00 in nominal damages. *Id.* at 211. Neither Plaintiffs-Respondents nor Petitioners appealed this award. *Id.* at 5.

The Ninth Circuit, in a divided *en banc* opinion, affirmed the district court's sweeping declaratory judgment on October 5, 1995. J.A. 210.

## SUMMARY OF ARGUMENT

Petitioners are sponsors of an initiative Amendment of the Arizona Constitution which was adopted by the voters of Arizona. Plaintiffs-Respondents are two former State employees whose rights to speak or write Spanish while working were allegedly infringed by the Amendment. Shortly after Plaintiffs filed suit to declare the Amendment unconstitutional, the defend[illegible] Attorney General published a lengthy opinion stating that the Amendment did not prevent State employees such as Plaintiffs from speaking or writing in non-English languages to facilitate provision of governmental services, and that the Amendment only required that the official version of official acts such as laws, court opinions, deeds, and the like be written in English. During proceedings below, the State Attorney General repeatedly confirmed this Opinion as the official position of the State. While the case proceeded, Plaintiffs voluntarily left State employment. The district court awarded $1.00 nominal damages to the two

[2] The request for nominal damages seems to have been contrived at the appellate stage of this litigation in an effort to save the case from mootness.



Plaintiffs, and they did not appeal this award. In addition, the lower courts issued a broad declaratory judgement which facially invalidated the Amendment, preventing its application in any circumstance.

1. Plaintiffs' suit for declaratory relief is moot, requiring vacating of the judgements below. Even in a First Amendment overbreadth case, the courts require that an actual case or controversy exist between the parties. *E.g.*, *Poe v. Ullman*, 367 U.S. 497 (1961). Here, both Plaintiffs voluntarily left State employment during the lower court proceedings, and the case was never certified as a class action. Accordingly, they have no legally cognizable interest in the declaratory relief issued below.

Alternatively, where, as here, State officials agree that legislation is inapplicable to claimants, the Court has repeatedly held that the case is moot. Moreover, Plaintiffs have never disputed that Arizona may constitutionally require statutes, court opinions, deeds and other similar "official acts" to be written in English, consistent with the Attorney General's Opinion.

Plaintiffs cannot circumvent mootness by relying on their claim for damages. The Attorney General promptly ruled that the Amendment did not apply to Plaintiffs' duties; thus, Plaintiffs suffered no injury. Indeed, Plaintiffs did not claim any damages in their original complaint. Only after mootness was suggested on appeal did Plaintiffs add a damages claim to their complaint. The District Court, however, awarded only one dollar nominal damages, and Plaintiffs did not appeal that award. Where damages are purely incidental to the main declaratory claim, and are insubstantial or nominal, they will not preserve the court's jurisdiction.

Likewise, the presence of intervenor-plaintiff Arizonans Against Constitutional Tampering ("ACT") does not create a case or controversy where none otherwise exists. ACT has no standing to continue this case absent plaintiffs-respondents

Yniguez and Gutierrez. ACT does not represent any class of state employees, and has not alleged any specific actual or threatened injury to its members. Absent some showing of specific injury, ACT cannot seek an advisory opinion as to the scope of the Arizona Amendment.

2. Assuming this Court determines that this case is not moot, Petitioners, who were granted leave to intervene as authors and principal supporters of the Amendment, have standing to obtain review of the sweeping declaratory judgment. Where, as here, executive officials fail or refuse to seek review to defend the constitutionality of legislation, this Court has allowed standing to legislators, or representatives of the legislature. In the instant case, the court of appeals properly held that Petitioners occupy a position analogous to legislators, because they authored the ballot initiative and successfully guided its enactment. Initiatives and referenda will often only be defended by their authors; the peoples' will should not be thwarted by leaving defenses of such measures solely in the hands of State officials.

3. Assuming the Court reaches the merits of this action, the Court should uphold the constitutionality of the Arizona Amendment on the basis that the Attorney General's Opinion was controlling and correct. The Court has repeatedly held that legislation should not be facially invalidated where state officials have interpreted and applied it in a constitutional manner. That principle is particularly forceful in the case at bar, in which Plaintiffs do not dispute that the Attorney General's opinion interprets the Amendment consistent with the First Amendment. The lower courts mistakenly failed to preserve the plainly constitutional applications of the Amendment, and improperly invalidated all possible applications. The judgments of the lower courts should be reversed, and this Court should hold that the Amendment, as interpreted by the Attorney General, is constitutional.



## ARGUMENT

### I. The Judgment Must Be Vacated Because The Case Has Become Moot.

The district court did not have jurisdiction to reach the merits of this lawsuit because no live case or controversy exists among the parties. Accordingly, the judgment below must be vacated and the case must be remanded with directions to dismiss. *See U.S. v. Munswinger,* 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss").

Article III limits the jurisdiction of the federal courts to "cases and controversies." *Flast v. Cohen*, 392 U.S. 83, 94 (1968). The case or controversy requirement must be met at every stage of the litigation. *Prieser v. Newkirk*, 422 U.S. 395, 401-02 (1975). If subsequent events moot the question sought to be adjudicated, the case must be dismissed. *Id.* at 95. A case is moot where the controversy between the parties is "no longer live" or the parties lack a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

As set forth below, this case is moot for two independent reasons.

#### A. This Case Is Moot Because Neither Yniguez Nor Gutierrez Is Currently Employed By The State Of Arizona.

Yniguez and Gutierrez, the original plaintiffs in this action, are no longer employed by the state of Arizona, and did not seek class certification. Thus, Plaintiffs have no legally cognizable interest in the declaratory judgment issued below, and this case is moot. The declaratory judgment must be vacated and the case must be remanded with directions to dis-

miss. *Weinstein v. Bradford*, 423 U.S. 147 (1975); *Feit v. Ward*, 886 F.2d 848, 856-858 (7th Cir. 1989).

### B. Alternatively, No Case Or Controversy Exists, Because The Attorney General's Opinion Makes Clear That The Arizona Amendment Does Not Apply To Plaintiffs' Conduct.

In the present case, all parties are in agreement that the Arizona Amendment, as interpreted by the Attorney General, would not apply to Plaintiffs' day-to-day employment duties. This Court's decisions hold that in such circumstances no Article III case or controversy exists sufficient to continue the jurisdiction of the Court.

The case or controversy limitation on federal court jurisdiction often arises in cases where the plaintiff challenges the constitutionality of a state law. The federal courts routinely deny jurisdiction when a plaintiff challenges a state law that the state authorities agree is inapplicable to plaintiff's conduct.

In *Poe v. Ullman*, 367 U.S. 497, plaintiffs challenged, as violative of the First and Fourteenth Amendments, a Connecticut statute which imposed criminal penalties for the use of any contraceptive drug or device. The Court, in a *per curiam* opinion, held that the case presented no justiciable controversy because there was no real threat of enforcement against the plaintiffs. The Court reasoned that "if a state prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed in the United States Supreme Court." *Id.* at 507-508.

The lower courts have frequently applied the holding of *Poe* to other First Amendment cases where the plaintiffs could not demonstrate a justiciable controversy between plaintiffs and the state defendants. For example, *in Graham v. Butterworth*, 5 F.3d 496 (11th Cir. 1993), plaintiff, a candidate for



judicial office, challenged the constitutionality of a state election law on the ground, *inter alia*, that "The statute . . . is overbroad and has a chilling effect on political speech." *Id.* at 498. The court held that at the time plaintiff filed the lawsuit, he had standing to challenge the law because he was threatened with prosecution. *Id.* The court, however, determined that the case was moot because after the lawsuit was filed, the state authorities withdrew their initial determination that the plaintiff's intended conduct was within the ambit of the statute, and notified plaintiff that his campaign conduct was not prohibited. *Id.* The court, therefore, held that no case or controversy existed between the parties and dismissed the case on the basis of mootness.

A similar result was reached in *Arlington County Republican Committee v. Arlington County, Virginia*, 983 F.2d 587 (4th Cir. 1993). In that case, political parties and candidates brought a First Amendment challenge to a zoning ordinance which imposed restrictions on the placement of signs in the County. The court held that there was no justiciable controversy between the parties because the County's historical interpretation and application of the zoning ordinance indicated that it would not enforce the ordinance as written. *Id.* at 596. *See also Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1990) (plaintiff lacked standing to challenge constitutionality of zoning ordinance on First Amendment grounds, where city attorney determined that the ordinance did not apply to plaintiff and those similarly situated); *Field v. Brown*, 610 F.2d 981, 991 (D.C. Cir. 1979) (no justiciable controversy existed where assistant attorney general wrote letter stating that he would not enforce the challenged statute); *Delaware Women's Health Organization*, 441 F. Supp. 497, 501 (D.Del. 1977) (no case or controversy existed where attorney general

affirmatively stated that he would not enforce the Delaware abortion statute as applied to physicians).[3]

The present case, like the cases discussed, *supra*, fails to present a justiciable controversy. The Arizona Amendment was passed by ballot initiative in 1988. J. A. 158. When the Arizona Amendment was adopted by the voters of Arizona, Plaintiff Yniguez was employed by the Arizona Department of Administration, where she handled medical malpractice claims asserted against the state. *Id.* at 159. Yniguez communicated with mono-lingual Spanish-speaking claimants in Spanish, and used a combination of English and Spanish with bilingual claimants. *Id.* at 47. Yniquez also drafted various settlement documents, some in English and/or Spanish. *Id.* at 48. After the passage of the Arizona Amendment, however, Yniguez ceased speaking Spanish on the job for fear that her use of Spanish made her vulnerable to disciplinary measures. *Id.* at 159. Plaintiff Gutierrez was a state legislator who spoke Spanish to some of his constituents. Neither Plaintiff has ever, in fact, suffered any disciplinary or other adverse action as a result of the passage of the Amendment.

Shortly after Yniguez filed this action, the Arizona Attorney General issued an opinion (the "Opinion") interpreting the Arizona Amendment. The Opinion of the Attorney General, repeatedly confirmed in this lawsuit as the formal posi-

[3] The Court's opinion in *Virginia v. American Booksellers Assn.*, 484 U.S. 383 (1988) also supports our position that Plaintiffs must show injury in fact to themselves, and that no such showing has been made here. There, several booksellers and their association were granted standing to make a First Amendment challenge because (1) they showed that the statute would specifically and seriously injure their continuing business interests, and (2) the Attorney General's construction of the statute did not clearly exempt the booksellers' sales. By contrast, in the instant case Plaintiffs have left state employment and cannot possibly be injured by the Amendment. Moreover, the Attorney General's formal written opinion, and briefs filed in the lower courts, clearly exempt Plaintiffs' actions from the scope of the Amendment.



tion of the State of Arizona, makes clear that the Amendment was not intended to apply, and would not be enforced against, Yniguez or Gutierrez, or others similarly situated.

The Opinion provides that the English mandate only applies to "official acts" of the State Arizona government; that "provision of non-English assistance, whether written or oral, is permissible, and *is required* if it is necessary to reasonably pride fair and effective services;" that "translation services and accommodating communications are permissible, *and may be required*, if reasonably necessary to the fair and effective delivery of services"; and that generally non-English languages may be used to facilitate "the fair and effective delivery of governmental services" or "when reasonable to facilitate the day-to-day operation of government. J. A. 62-65, 68, 71-74. (emphasis added). In addition, the Opinion concluded that "Communications between elected and other governmental employees with the public at large may be in a language other than English, and that the "State may act in a language other than English . . . to comply with [the United States Constitution and] other federal laws." *Id.* at 62, 65, 68, 71-72.

Plainly, the Attorney General's Opinion extinguished any arguable "case or controversy" between the parties. Even assuming there was a reasonable threat of enforcement against Yniguez and Gutierrez to confer standing at the outset of this litigation, the Attorney General's Opinion mooted the question presented to the court. *See Graham, supra.* Further, the parties are in agreement that the State of Arizona may constitutionally require that state statutes, legal opinions, government contracts, deeds, and similar "official" documents be printed in the English language. Under the cases discussed above, the fact that other unspecified private parties may at some future time bring suit and ask for a broader interpretation of the Amendment does not now give the courts jurisdiction over these defendant state officials.

Thus, the federal courts lack jurisdiction over this case because no case or controversy exists between the parties. *See Poe*, 367 at 505 (the Supreme Court will not "entertain cases which disclose a want of a truly adversary contest"). Any opinion on the merits of the issue presented would be advisory only. The judgment of the lower courts must be vacated and the case must be remanded with directions to dismiss. *See Munswinger, supra.*

### C. Plaintiffs' Claim For Nominal Damages Does Not Prevent Dismissal Of This Case As Moot.

Plaintiffs claim for nominal damages cannot revive this otherwise moot case. *Memphis Light, Gas & Water Div. v. Croft*, 436 U.S. 1,9 (1978). "The basic proposition which plaintiff[s] . . . seek to establish is the constitutionality of the . . . [Arizona Amendment]. Not having found a justifiable controversy permitting a declaration, the claim for nominal damages, which is clearly incidental to the relief sought, cannot properly be the basis upon which a court should find a case or controversy where none in fact exists." *Kerrigan v. Boucher*, 450 F. 2d 487, 489-490 (2d Cir. 1971); *see Geraci v. Trenchtlinger*, 487 F.2d 590, 592 (2d Cir. 1973); *Duffy v. Quattrocchi*, 576 F. Supp. 336, 342 (D.R.I., 1983).

Moreover, plaintiffs request for nominal damages was not made until *after* the declaratory judgment was issued below and *after* plaintiffs had left state employment. Notwithstanding this fact, the Ninth Circuit held that the case was not moot and permitted plaintiffs to file a cross-appeal seeking nominal damages. This was error. The case should have been dismissed as moot at that time. *See Fox v. Board of Trustees*, 148 F. R. D. 474, 478 (N. D. N. Y. 1993) (complaint which seeks "other just and proper relief" is not sufficient to save a case from mootness).[4]

[4] On remand the District Court awarded her $1.00. None of the parties appeal this award.



Thus, in accordance with *Munswinger, supra*, the declaratory judgment entered below must be vacated and the case must be remanded with directions to dismiss.

### D. Intervenors Arizonans Against Constitutional Tampering Cannot Save This Case From Mootness.

The presence of Arizonans Against Constitutional Tampering ("ACT") as an intervenor-plaintiff does not save this case from mootness.

As discussed *supra*, this case is moot as to plaintiffs-respondents Yniguez and Gutierrez. In order to continue this case in its own right, intervenor-plaintiff ACT must independently satisfy the requirements of Article III. *See Diamond v. Charles*, 476 U.S 54, 69 (1986) (intervenor cannot continue a case absent original parties unless the intervenor satisfies Article III). ACT must demonstrate "that [it] personally suffered some actual or threatened injury" as a result of the challenged conduct of the opposing party. *Id.* at 61, quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1975).

ACT cannot satisfy the requirements of Article III. ACT has not alleged that any enforcement action was taken or threatened against any of its members. ACT does not represent a class of state employees. In any event, the Attorney General's opinion, filed well before ACT intervened in this litigation, makes clear that the Arizona Amendment does not prohibit employees from using other languages in the day to day provision of government services, and that the Amendment only requires employees to use English in matters related to "official acts" of the state government. *See* discussion, *supra* at pp. 10-12.

ACT's only interest in this litigation is based on its status as the opponent of the ballot initiative that resulted in the passage of the Arizona Amendment. This does not confer standing upon ACT to seek an advisory opinion as to the scope of the Arizona Amendment. ACT must demonstrate an

actual or threatened injury to itself or its members before it can invoke the jurisdiction of this Court. The mere passage of the Arizona Amendment does not amount to such an injury absent enforcement action against ACT or its members. *See Poe, supra.*

It is clear that ACT does not have standing to continue this case absent the original party-plaintiffs. Accordingly, the presence of ACT as an intervenor-plaintiff cannot breathe life into this otherwise moot case.

## II. Petitioners Arizonans For Official English And Robert D. Park Have Standing To Seek Review in This Court.

As the official sponsors of the ballot initiative which resulted in the enactment of Arizona Constitution Article XXVIII (the "Arizona Amendment"), Petitioners Arizonans for Official English ("AOE") and Robert D. Park ("Park") suffered Article III injury in fact as a result of the overbroad declaratory judgment issued below. The State of Arizona and its officials failed to file an appeal of this declaratory judgment, and did not file a petition for certiorari. As sponsors of the initiative, AOE and Park stand in the position of state legislators, who have Article III standing when executive officials fail to defend the constitutionality of a law. AOE and Park thus have Article III standing to obtain review of the adverse declaratory judgment in this Court.[5]

This Court has recognized the standing[6] of legislators to intervene and defend the validity of a state or federal law,

[5] In contrast, ACT, the opponent of the ballot initiative that resulted in the passage of the Arizona Amendment, has not sustained Article III injury in fact. As explained above, p. 13, no actual or threatened enforcement of the Amendment has been initiated against ACT or its members.

[6] In order to establish standing, a party must demonstrate three things: (1) injury in fact; (2) a causal relationship between the injury and the challenged action; and (3) a likelihood that the injury will be redressed by a favorable decision of the court. *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville Florida*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586, 595 (1993).



where the executive branch of the government declines to do so. In *Karcher v. May*, 484 U.S. 72 (1987), a teacher, along with several students and parents, challenged the constitutionality of a New Jersey law which permitted students to observe a moment of silence before the start of each school day. The plaintiffs alleged that the statute violated the Establishment Clause of the First Amendment. When it became apparent that the named defendants would not defend the statute, two members of the state legislature, Karcher and Orechio, sought and received permission to intervene in their official capacities to defend the lawsuit.

After the district court and the court of appeals held that the statute violated the First Amendment, Karcher and Orechio sought review in this Court. By this time, however, Karcher and Orechio had lost their legislative posts. For this reason, the Court dismissed the case for want of jurisdiction.[7] The Court's opinion, however, recognized the standing of the New Jersey legislature to defend the constitutionality of a New Jersey statute challenged in federal court. *See Id.* at 484 (J. White concurrence) ("It bears pointing out that we have now acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court"). *See also Burke v. Barnes*, 479 U.S. 361, 363 n.1 (1987) ("We can assume, arguendo, that a House of Congress suffers a judicially cognizable injury when the votes it has cast to pass an otherwise live statute have been nullified by action on the part of the Executive Branch").

[7] The Court held that "the authority to pursue the lawsuit on behalf of the legislature belongs to those who succeeded Karcher and Orechio in office." *Id.* at 477. The case was dismissed because Karcher and Orechio's successors withdrew the appeal and there was thus no case or controversy.

AOE and Park, as the official sponsors of the ballot initiative which resulted in the passage of the Arizona Amendment, occupy a position which is substantially identical to a state legislator or a representative of a legislature. *See* J.A. 157. They introduced the ballot initiative and campaigned for its enactment in much the same way a legislator introduces a new bill and lobbies for its support. If the author of an initiative measure had no standing to defend its constitutionality, the will of the people would often be thwarted by hostile or indifferent state officials.

AOE and Park are not simply "concerned bystanders" who have no direct interest in the outcome of this case. Petitioners invested considerable time and effort into the passage of the Arizona Amendment and they have a strong interest in its vitality. Indeed, Arizona law bestows specific rights and duties upon the sponsor of a ballot initiative which recognizes the sponsor's superior interest in the initiative as compared to the voters at large. *See* Ariz.Rev.Stat. § 19-111 (sponsor of ballot initiative must file an application with the secretary of state); § 19-122 (if an application for a ballot initiative is rejected, the secretary of state must provide the sponsor with a written statement of the reasons for the rejection); § 19-124 (the sponsor of a ballot initiative may submit an argument to the secretary of state in support of the initiative).

Thus, just as the New Jersey Legislature satisfied the standing requirements in *Karcher*, *supra*, Petitioners AOE and Park meet those requirements in the present case. The invalidation of the Arizona Amendment by the lower courts caused AOE and Park an injury in fact. This injury can be redressed by this Court if the judgment below is vacated, or reversed on the basis that the Attorney General's Opinion controls.



## III. Assuming This Court Has Jurisdiction, The Judgment Below Should Be Reversed Because Approval of the Attorney General's Opinion, Not Facial Invalidation, is the Proper Remedy.

The opinion below erred in ruling that the entire Arizona Amendment was facially invalid. No application of the Amendment was saved -- even admittedly Constitutional provisions such as that requiring use of English in court opinions and similar official documents. In so holding, the majority opinion below conflicts with numerous Supreme Court opinions, which have consistently held that in a case such as this one, where the challenged statute has a broad range of legitimate applications, the more appropriate remedy is to restrict the scope of the statute to cure any constitutional infirmities.

Facial invalidation of a statute challenged on constitutional grounds is "the exception" and "has been employed by the Court sparingly and only as a last resort." *Broadrick v. State of Oklahoma*, 413 U.S. 601, 613, 615 (1973). Courts must exercise caution and restraint in considering a facial challenge so as to avoid "unnecessary interference" with a state's policy choices. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

Facial invalidation is only proper where the threat of unconstitutionality is both *real* and *substantial* when compared to the statute's legitimate sweep. *Broadrick*, 413 U.S. at 615. Only if the "overbreadth of the . . . statute, in relation to its legitimate reach, is substantial" will it "warrant a declaration of facial invalidity". *Brockett v. Spokane*, 472 U.S. 491, 503 fn. 12 (1985). The Court is reluctant to invalidate a statute in its entirety when the challenged law has at least some legitimate application. *See Broadrick*, 413 U.S. at 616-17.

Moreover, the Court will not entertain a facial challenge when a narrower remedy will fully protect the litigants. In *U.S. v. National Treasury Employees Union*, __ U.S. __, 115 S.Ct. 1003 (1995), a class of plaintiffs composed of all Ex-

ecutive Branch employees below GS-16 challenged the constitutionality of a statute that placed a ban on federal employees receiving honoraria for speeches. *Id.* at 1010. The lower courts held that the statute violated the First Amendment and issued an injunction against enforcement of the statute against *any* executive branch employee. *Id.* at 1011-12. This Court agreed that the statute was invalid as applied to the plaintiff class; however, the Court reversed the judgment of the lower court in so far as it purported to invalidate the statute as applied to the *entire executive branch*. *Id.* at 1018-19. The Court reasoned that "although the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants") (internal citations omitted.) *Id.* at 1018. The Court noted that the activities and status of non-parties might be quite different from those of the plaintiff class. *Id.* at 1019.

The declaratory judgment issued below is manifestly overbroad under the standards set forth in *Broadrick* and *National Treasury Employees Union*. Facial invalidation is not appropriate, where, as here, the challenged statute has a wide range of legitimate applications. For example, there is no question that the Arizona Amendment is constitutional in requiring all official government documents to be prepared in English, and requiring all court and administrative hearings to be conducted in English or with English translation.

Even assuming the Amendment prohibited the speech of Yniguez and Gutierrez and others similarly situated, the court could have protected the Plaintiffs by fashioning a far narrower remedy. Indeed, the Arizona Attorney General issued a formal opinion interpreting the Amendment to apply only to "official" acts or government functions, not to Plaintiffs' day-to-day duties. Adoption of the Attorney General's opinion would have saved the Amendment from total invalidation while fully protecting the Plaintiffs.



This Court has repeatedly stated that a statute that is "readily susceptible" to a narrowing construction is not subject to facial invalidation. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *Erznoznik*, 422 U.S. at 216 (1975). In judging the constitutionality of a state law, the Court has regularly relied upon interpretations of the challenged statute by state officials and/or agencies -- some far less authoritative than those of the Arizona Attorney General here. *See, e.g., Frisby*, 487 U.S. at 483 (construing picketing ordinance narrowly to save its constitutionality and stating that "This narrow reading is supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view of the 'picketing' proscribed by the ordinance"); *see also Broadrick*, 413 U.S. at 617-18 (referring to State Personnel Boards' interpretation of the statute in question and stating, "Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute"); *Bellotti v. Baird*, 428 U.S. 132, 143 (1976) ("the interpretation placed on the statute by appellants in this Court is of some importance and merits attention because they are the officials charged with the enforcement of the statute"); *Law Students Research Council v. Wadword*, 401 U.S. 154, 162 (1971) (accepting the interpretation of state enforcement officials despite the "language of the Rule [which] lends itself to a construction that could raise substantial constitutional questions").

Prior decisions of this Court make clear that the proffered narrowing construction need not be the most natural reading of the statute. In *United States v. X-Citement Video, Inc.*, __ U.S. __, 115 S.Ct. 464, 472 (1994), the Court rejected a strict grammatical construction of statutory language, reasoning that "It is . . . incumbent upon us to read the statute to eliminate . . . [constitutional] doubts so long as such a reading is not plainly contrary to the intent of [the legislature].". In support of this canon of statutory construction, the opinion cited the analysis in *Debartolo Corp. v. Fla. Gulf Coast*

*Building and Construction Trades Council*, 485 U.S. 568, 575 (1988), which quoted *Hooper v. California*, 155 U.S. 648, 657 (1895). The latter case interpreted a California penal statute in a manner which avoided constitutional problems, stating that "'the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Debartolo*, 485 U.S. at 575. *See also Ehlert v. United States*, 402 U.S. 99, 105-106 (1971) (Army General Counsel's opinion as to meaning of draft statute accepted to save constitutionality of statute, where opinion was "plausible . . . but not the only possible [construction]").

In the instant action, the Arizona Attorney General issued an opinion construing the amendment to apply only to the "official acts" of government. This construction of the Amendment was reasonable under the standards set forth in *X-Citement*, *supra*. The lower courts did not even contend that this construction conflicted with the intent of the framers of the Amendment, or the general understanding of the electorate. The Attorney General's opinion is also consistent with the language of the Amendment. The Amendment (including its title) repeatedly refers to English as the "official language" of Arizona. *Webster's Third New International Dictionary*, p. 1566 (1976) defines "official" to mean "formal" and "authoritative." Thus, the Attorney General properly ruled that the Amendment did not apply to informal conversations and writings of government employees.

The lower courts rejected the Attorney General's construction, because Sec. 3(1)(a) of the Amendment, which requires state political units to "act in English", does not contain the word "official". The *X-Citement* opinion, however, teaches that courts should not demand reiteration of words in various parts of a statute when judging its constitutionality. *X-Citement*, 115 S.Ct. at 467. Moreover, Sections 1 and 2 of the Amendment make clear that the Amendment only deals with official or formal English use. Thus, there was no need



to repeat this limitation in Sections 3 or 4, which involve other details regarding when English is or is not required.

Judge Reinhardt's majority opinion is also inconsistent with the *X-Citement* rationale insofar as it insisted on a rigid grammatical construction of the Amendment. Section 3(1)(a) of the Amendment provides that political subdivisions must "act in English". The Attorney General properly determined that "act" in this context means a "decision or determination of a sovereign, a legislative council, a court of justice," relying on *Webster's Third International Dictionary*, *supra*, at 20. The Court of Appeals improperly rejected this interpretation on the ultra-literal basis that this definition was contained under the noun "act", whereas Sec. 3(1)(a) uses "act" as a verb. A similarly rigid grammatical construction was rejected by this Court in *X-Citement*, *supra*.

In sum, the Arizona Attorney General has provided a reasonable interpretation of the Amendment, which carves out its legitimate applications and cures any arguable constitutional defects. It is immaterial that the Opinion is not the most natural reading of the Amendment, or the reading that the lower courts deem to be such. The Opinion demonstrates that the Amendment is "readily susceptible" to a narrowing construction. Even more leeway should be given to state officials in construing their own basic constitutional provisions, especially those which are enacted by citizen referendum and which are particularly in need of administrative construction. The lower courts' action in effect improperly interpreted the Amendment on the basis of interpretations of the various opponents of the initiative -- a clearly improper mode of construction. In keeping with well established precedent this Court should approve the Attorney General's opinion to save the Amendment from facial invalidation.

The Court's decisions narrowly restricting facial invalidation are not simply procedural, but rather constitute a fundamental principle necessary for the proper balancing of pow-

ers in a representative democracy, including the relationship of judicial and legislative powers. The majority opinion below egregiously disrupts that balance, by substituting the views of several judges regarding the official language of state government, in place of a state constitutional provision, approved by a majority of Arizona voters and carefully implemented by an opinion of the elected State Attorney General. The majority opinion below represents an improper application of this Court's standards regarding facial invalidation, and therefore, must be reversed.

## CONCLUSION

For the foregoing reasons, *Amicus Curiae* U.S. English respectfully submits that this case is moot, and the judgment below should be vacated. In the event the Court reaches the merits of this case, U.S. English respectfully submits that the judgment below should be reversed and the opinion of the Arizona Attorney General should be adopted to cure any arguable constitutional defects in the Amendment.

Respectfully submitted,

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*IN THE*
*SUPREME COURT OF THE UNITED STATES*
October Term, 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

*v.*

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

*On Writ Of Certiorari to the*
*United States Court of Appeals for the Ninth Circuit*

# BRIEF OF FLA-187 COMMITTEE, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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## INTEREST OF THE AMICI CURIAE

The **FLA-187 Committee, Inc.**, located in Boca Raton, Florida, and founded in April, 1995, is a non-profit corporation engaged in grassroots political activity in the State of Florida. The Committee registered as a "political committee," and in May, 1995, filed four proposed amendments to Florida's Constitution with the Secretary of State. One of the amendments bears the title "Governmental Implementation and Utilization of Official English," and by its express terms will amend Article II, Section 9 of the state constitution. Distribution of the amendment petitions began in mid-1995, and literally hundreds of grassroots volunteers have collected thousands of signatures from Florida's registered voters as of this date. The FLA-187 Committee believes that the Ninth Circuit Court of Appeals' ruling in the instant matter, if not reviewed by this tribunal, will have a chilling effect on political activists throughout the nation who are utilizing the initiative and referendum process to implement or strengthen their state's "Official English" laws. *All parties have consented to the filing of this Brief.*

**Citizens of Dade United** ("CODU"), a non-profit corporation based in Miami, Florida, is also engaged in grassroots political activity in the State of Florida. Incorporated in 1980, CODU was instrumental in distributing and collecting a sizable number of the more than 300,000 petition signatures needed to place the original "Official English Amendment" on Florida's General Election Ballot in 1988; members also devoted thousands of hours to the passage of the amendment, now codified as Article II, Section 9, of the Florida Constitution. CODU's membership provided guidance in the 1995 drafting of the proposed FLA-187 amendment relating to "Official English," and has assisted in the collection of petitions relating to said amendment.

The **California Coalition for Immigration Reform** ("CCIR"), headquartered in Huntington Beach, California, is an incorporated grassroots political organization which serves as an umbrella organization for some 24 grassroots groups in 5 states which are concerned with the influx of legal and illegal immigrants into the western United States, and with the assimilation of new arrivals into the American mainstream. CCIR was a sponsoring organization of California's Proposition 187 in 1994, and is currently in the process of drafting a citizen's initiative similar in scope and effect to Arizona Constitution Article XXVIII, the subject of the instant case. CCIR is cognizant of California's presence within the Ninth Circuit's jurisdiction, and seeks review of this decision in view of its direct impact on all grassroots activists living in states on the West Coast.

The **Freedom Forum** ("Forum") is an unincorporated association based in Montgomery, Alabama, serving as an umbrella organization for grassroots political groups within Alabama. The Forum has conducted research into the growing non-English speaking population within the state, and has commenced with the drafting of legislation for consideration by state legislators. The Forum is concerned that the Ninth Circuit's decision in *Yniguez* will have a substantially negative impact on proposed legislative or constitutional revisions relating to Official English.



## SUMMARY OF ARGUMENT

The *amici curiae* supporting the Petitioners are all grassroots political organizations with a deep concern for the nationwide impact of the ruling by the Ninth Circuit Court of Appeals in *Yniguez*.

The *amici* have set forth the historical context for the utilization of the initiative process in the United States. The dynamic level of growth in its use, and event the support for a national initiative, underscore the initiative process' critical place on the modern political landscape.

The district court and court of appeals issued rulings in *Yniguez* setting forth new modes of First Amendment doctrinal analysis, based upon ethereal constitutional underpinnings. Grassroots political activists around the nation are seeking protection for their efforts from federal judges who desire to substitute their judgment for that of "the people" in the political arena.

The *amici* further assert that the appropriate mechanism for addressing tensions between cultural pluralism and efforts to maintain assimilation is the legislative process. In view of the dangers of cultural apartheid and the enormous costs attendant to non-assimilation, the states and the federal government should be afforded substantial flexibility in this area.

## LEGAL ARGUMENT

### I. THE POWERS RESERVED TO THE PEOPLE SHOULD NOT BE ABROGATED BY THE UNWARRANTED EXPANSION OF CONSTITUTIONAL DOCTRINE

It is beyond dispute that the latter portion of the 20th Century has brought rapid and far-sweeping changes to the sociopolitical landscape of the United States. It has been suggested that notions of "economic insecurity" or "unhappiness with big government" are the root causes of the disquietude within the American populace. Michael Sandal, "America's Search for a New Public Philosophy," *Atlantic Monthly*, at 57 (March, 1996).

> The problem, though, runs deeper than these diagnoses suggest; it concerns the public philosophy by which we live and the conception of citizenship that informs our political debates. American politics has lost its civic voice. Despite their disagreements, liberals and conservatives share an impoverished vision of citizenship, leaving them unable to address the anxiety and frustration abroad in the land.

*Id.* This perceived loss by Americans, of their "civic voice," has engendered the type of activism exemplified by the passage of the state constitutional provision at issue in the instant appeal.

The matter *sub judice* touches directly upon Article XXVIII of the Arizona Constitution, but casts an indirect shadow over the efforts of hundreds of thousands of grassroots political activists, past and present, who have



participated in majoritarian democracy at its most basic level. The majority opinion of the *Yniguez* tribunal, particularly its creation of several new First Amendment litmus tests which interfere with state governmental operations, has a potentially far-reaching effect at every level of the political process, and a reversal of the Ninth Circuit court's decision in *Yniguez* by this court is fully warranted.

#### A. Historical Context: Participatory Democracy

The "people" and the "states" are the repository of all powers not specifically delegated to the United States. U.S. Constitution, amend. X ; 2 J. Story, *Commentaries on the Constitution of the United States* 652 (5th ed. 1891). The "right of the people" to communicate with the government directly and to engage in direct democratic action is constitutionally safeguarded by the First Amendment's prohibition against the enactment of any law abridging the right "to petition the [g]overnment for a redress of grievances." U.S. Constitution, amend. I.

From the same analytical wellspring from which the right to petition arose came the direct participation of the citizenry in constitutional conventions and in the ratification process during this nation's founding period. T. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 12-20 (1989). Beginning in the latter 19th century, some two dozen states have adopted the Swiss-style constitutional initiative mechanism, and variations are highly popular throughout the U.S. today. Collins and Oesterle, *Structuring the Ballot Initiative*, 66 U. Colo. L. Rev. 47, 54 (1995).

Through the enactment of measures providing for a system of initiative and/or referendum, the electorate obtains the means to directly propose laws or amendments to a state's constitution. *See, e.g.*, Ariz. Const. art. XXI; Fla. Const. art. 11, sec. 3. It was intended that the initiative process would empower "the people," indeed, that the initiative would serve as "a way around monied influence on elected representatives ... would thrust from power the Captains of Greed." Collins, *supra p. 5*, at 56. In view of the chronic lack of financing suffered by the grassroots organizations which typically advance initiative campaigns, the enormous petition-drives necessary to gather signatures for ballot access, and the typical presence of unpaid grassroots volunteers rather than paid political operatives in most campaign positions, it is not unrealistic to characterize these campaigns as the quintessence of participatory democracy.

## B. Modern Participatory Democracy and Review by the Federal Judiciary

A dynamic grassroots effort is essential in most modern initiative campaigns; this characterization would fit not only petitioner Arizonans for Official English's 1988 Campaign for Proposition 106 (now codified as Article XXVIII), but the 1994 California Proposition 187 campaign by *amicus* C.C.I.R. and *amicus* FLA-187 Committee's current Official English campaign, in addition to numerous other grassroots citizen-based initiative drives over the past decade. *See, e.g.*, Carson, *209,154 Signatures are Filed for 'English Only' Initiative*, Arizona Daily Star, July 8, 1988, at 1B, col. 1; *see generally* Peter Brimelow, *Alien Nation* 152 (1995).



The thirst for an increase in direct democratic participation has grown throughout this century; in 1988 California voters received explanatory pamphlets on proposed state, county and local amendments, initiatives and laws. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1508-09 (1990). Further, two-thirds of persons questioned in a 1983 Gallup survey indicated support for direct citizen-review of state and local laws, while polls conducted in 1978, 1981, and 1987 all supported a constitutional amendment for a national initiative by a more than two-to-one margin. *Id.* at 1507 n. 16.

This Court should provide guidance to lower federal courts, and should admonish them to exercise exceptional care during the review of a citizen-based initiative; those initiatives that bear a reasonable relationship to traditional state objectives, and which do not trample well-settled individual liberties, should be shielded from judicial whim.

As noted by Chief [then Associate] Justice Rehnquist, "[i]f we do not likewise contain the courts, in some way, from negating a law that, although unwise in the eyes of some, is nonetheless rendered unconstitutional only by a considerable stretch of judicial imagination, we risk a repetition of what one of my predecessors on the Supreme Court referred to as 'Judicial Supremacy.'" W. Rehnquist, *Point, Counterpoint: The Evolution of American Political Philosophy*, 34. Vand. L. Rev. 249, 263 (1981). As noted by Professor Eule, "[a] nation that traces power to the people's will does not easily digest the practice of unelected and unaccountable judges denying the populace what most of them appear to want." Eule, *supra*, at 1504.

This Court has acknowledged that state laws which provide for initiative and referendum "demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James v. Valtierra*, 402 U.S. 137, 141 (1971). "Under our constitutional assumptions, all power derives from the people ... [and] the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *Eastlake v. Forest City Enterprises*, 426 U.S. 668, 672 (1976) (Burger, C.J.) (citations omitted).

It has been noted that, abstract theories of sovereignty and democracy aside, "[a] judicial decision striking down a voter effort also risks engendering a perception by the public itself that its will has been subverted." Eule, *supra* p. 7, 99 Yale L.J. at 1506. Just such a perception has arisen in Arizona because of the *Yniguez* decisions, in California because of the trial court's decision in *LULAC v. Wilson*, No. CV 94 - 7569 MRP (C.D. Cal. Nov. 20, 1995) [Proposition 187 decision], and elsewhere in the nation. We would do well to recall the Declaration of Independence's assertion that governments derive "their just powers from the consent of the governed."

## C. Participatory Democracy and the *Yniguez* Rulings

The review by federal courts of an "Official English" measure, as well as other enactments passed through initiative and referendum efforts, invariably will follow a grueling campaign where the issue is thoroughly debated on all sides. *See generally* Rosalie Pedalino Porter, *Forked Tongue: The Politics of Bilingual Education* 207-13 (1990).



The campaign engaged in by the Arizonans for Official English ("A.O.E.") in the 1988 Arizona Proposition 106 campaign was no exception. A.O.E., its supporters and grassroots volunteers, were required to obtain by initiative petition the signatures of "a number of qualified electors equal to fifteen per centum of the total number of votes for all candidates for Governor at the last preceding general election." Ariz. Const. art. XXI. sec. 1, or 130,048 valid signatures. Carson, *209,154 Signatures are Filed for 'English Only' Initiative*, Arizona Daily Star, July 8, 1988, at 1B, col. 1.

This collection effort by hundreds of volunteers and paid signature gatherers over many months was followed by an arduous election campaign. *See* Hall, *Proposition 106 Supported by Most Voters*, Arizona Republic, October 30, 1988, at B1, col. 1: Astle, *It's Still English, Officially Speaking*, Prescott Sun, November 11, 1988, at 1. The issue was debated throughout the state, on a topic of national political significance: the creation of incentives for immigrants to assimilate rapidly, and prevent the estrangement of linguistic groups, so familiar to those who have studied Belgium, Africa, Canada, China, the Balkans and other bilingual or multilingual areas. *See, e.g.*, Peter Brimelow, *Alien Nation* 193-95 (1995).

Following the expression of the political will of the people of Arizona in the November, 1988 election, a state employee, Ms. Yniguez, immediately filed suit in federal court alleging deprivation of constitutionally-protected rights, including abridgment of her freedom of speech.

The trial court, in its 1990 ruling on the constitutional claim, did not even acknowledge that the electoral expression of "the people's will" was to be subordinated to the First Amendment claim advanced by plaintiff Yniguez; indeed, except for bare mention of the general election, the direct participation of Arizona's citizenry in this matter goes unmentioned. *See Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990).

At the appellate level, in deciding that Article XXVIII was facially overbroad, Circuit Judge Reinhardt's majority opinion delineates several new constitutional doctrines, including the assertion that the regulation of choice of language by the state for public employees is tantamount to regulation of speech content. *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 934-36 (9th Cir. 1995). In framing additional new constitutional standards, the court opined that the individual decision of an employee or elected official regarding "best interests" will serve as the benchmark for the constitutional analysis of State-mandated public language choices, *id.* at 937, and also that the fact that speech occurs as part of the performance of a public employee's job functions is not conclusive in terms of control, but instead the State's right to control that speech must undergo a balancing test, *id.* at 940.

The *Yniguez* majority failed to distinguish this Court's recent ruling that "the government as employer has far broader powers than does the government as sovereign ... [that in] many situations ... the government must be able to restrict its employees' speech ... [and] many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." *Waters v. Churchill* ___U.S.____, 114 S.Ct. 1878, 1886 (1994). As noted in Judge Fernandez' *Yniguez*



dissenting opinion, this Court has held that a state, when it is the speaker, "may make content-based choices." *Yniguez*, 69 F. 3d at 957 (Fernandez, J., dissenting) *quoting Rosenberger v. Rector and Visitors of Univ. of Va.*, ____U.S.____, 115 S. Ct. 2510, 2518-19 (1995). Further, the *Rosenberger* court opined "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 115 S. Ct. at 2519, *citing Rust v. Sullivan*, 500 U.S. 173, 194, 111 S. Ct. 1759, 1773 (1991).

Grassroots political organizations working on initiative campaigns believe that the *Yniguez* majority objected to Article XXVIII on the basis of political philosophy, and in effect substituted the majority's view on multilingualism for that of the voters of Arizona. This issue is decidedly political, and neither Ms. Yniquez nor recipients of public services have a constitutional basis for deciding the mode of delivery. The *Yniguez* majority's analysis has ignored "the difference between a government employee who contributes to the marketplace of ideas and an employee who speaks in a mode which helps the members of public [in] understanding what he says." *Yniguez*, 69 F.3d at 960 (Wallace, C.J., dissenting), *citing United States v. National Treasury Employees Union*, ____U.S. _____, 115 S. Ct. 1003, 1015 (1995).

The *Yniguez* majority's failure to make this critical distinction led to the decision under review, and has engendered in the public's eye the belief that "judicial supremacy," which Judge Rehnquist cautioned against, is the root cause of this thwarting of the people's will.

## II. THE STATE CONSTITUTIONAL PROVISION WHICH MANDATES THE CONDUCTING OF GOVERNMENTAL AFFAIRS IN ENGLISH IS A RATIONAL CHOICE PREDICATED UPON VALID SOCIOPOLITICAL CONSIDERATIONS

These *amici* support the Petitioners' assertion that Arizona's "choice of language" is in furtherance of a legitimate state interest, and that recipients of government services have no basis to compel the state to act in other languages. *See, e.g., Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994) (no basis to compel governmental notices in French); *Guadalupe Organization Inc., v. Tempe Elementary School District*, 587 F.2d 1022 (9th Cir.1978) (language choice serves a legitimate state interest). Further, when the government is the "speaker" it may control the nature of information disseminated on its behalf. *Rosenberger*, _____U.S. at _____, 115 S.Ct. at 2518-19.

There are also a variety of differing views today on the "traditional American melting pot" which cause concern over our nation's ability to remain a cohesive political unit. The state and federal governments are not forbidden from utilizing public employment to effect the functioning of society. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 n.4 (1990).

### A. Assimilation into the American Polity is an Issue Which Should be Resolved Within the Legislative Process.

As noted above, the hallowed place accorded "the traditional American melting pot" has been undermined over the past several decades. Powerful code words, such as



"diversity" and "multiculturalism," abound in the ongoing debate. "[I]n the United States, competing tensions exist between the impulse toward maintaining cultural pluralism and the efforts to hasten assimilation." Rosalie Pedalino Porter, *Forked Tongue: The Politics of Bilingual Education* 94 (1990).

An appropriate resolution of this issue is of immense political import, as our Canadian neighbors have learned. Torriero, *Close Call: Canada Stays United - Quebec Separatists Lose by Less than 1 %*, [Ft. Lauderdale] Sun Sentinel, October 31, 1995, at 1A, col. 2; *Prime Minister Struggles to Keep Canada Together*, Sun Sentinel, October 25, 1995, at 8A, col.2. The instant litigation, involving a measured approach in a nation of some 300 - plus languages, attracted national attention after the 1990 ruling at the trial level.

> The Arizona law, however, was meant to address the issue of national cohesion at the level of politics. The problem is real. America has experienced waves of immigration in the past. What is new today is a political program of de-assimilation: the assertion that newcomers have nothing to learn about the society they wish to join - that the necessity of learning is, in fact, an infringement of their rights.
>
> The practical effects of such aggressive parochialism would be cultural apartheid. That doesn't bother the operators who insist that Spanish or oriental languages be given parity with English. A balkanized America would give them built-in political leverage.

*The Balkans, U.S.A.*, National Review, March 5, 1990, at 19, col.2.

Linguistic unity is a valid concern at every level of government in this nation. First, the failure of groups and/or individuals to assimilate into the American cultural mainstream presages linguistic and cultural isolation, Peter Brimelow, *supra* p.9, at 8. This isolation directly fuels the desire for geopolitical separatism. *See* Chavez, *One Nation, One Common Language*, The Failure of Bilingual Education 9 (1990) (at 1995 National Association for Bilingual Education Conference speakers challenged notion of U.S. sovereignty and asserted Southwest and northern Mexico form one cultural region, *La Frontera*); Brimelow, *supra* p.9 , at 125 (citing Eritrea, Malaysia, Czechoslovakia, Soviet Union, Yugoslavia, Lebanon and others).

Second, there are massive financial costs attendant to non-assimilation. An analogy to the rise in those costs, as we draw immigrants seeking social services from increasingly diverse regions and accompanying linguistic dissimilitude, may be drawn with the growth in expenditures for bilingual education. Commencing in the late 1960's, bilingual education started as a $7.5 **Million** program aiding Mexican-American children until they acquired sufficient English fluency. Chavez, *supra*, at 9. Current estimates place the 1993-1994 costs of programs for limited-English proficient students at over $12 **Billion** in State and Federal funds. Youngblood, *The Cost of Bilingual Education in the U.S.: A Review of the ALEC Report*, READ Perspectives 39-41 (Fall, 1995).

In Dade County, Florida, the total cost of Bilingual programs during the 1980-81 school year was $10,193,884 (Dade County School Board 1981-82 Recommended Budget); as of the 1993-94 year costs had skyrocketed to $78,020,000, and projected costs for 1995-96 are $97,850,000 (Dade County School Board 1995-96 Budget).



The efforts of Arizona's citizens, and any governmental entity in this nation, to forestall ***linguistic and cultural apartheid***, and to preclude the hemorrhaging of the public fisc by encouraging assimilation in a reasonable fashion, should remain within the legislative realm and should not be subject to creative constitutional analysis by federal judges with contrary political viewpoints.

## B. The American Public Favors Official English as a Response to this National Dilemmma

As our nation has welcomed a more diverse influx over the past three decades, since the 1965 Immigration Act, support for the formal establishment of English as the official language has crystallized. In an August, 1995 poll, asking "Do you think English should be made the official language of the United States," 86% of Americans were in agreement. *U.S. English/Luntz Survey*, READ Perspectives 49 (Spring 1996). 80% of self-described liberals and 91% of self-described conservatives were in favor of the designation, as well as 86% of African-Americans and 78% of all non-white Americans. *Id.*

The decisions below in the instant case have interjected newly-created First Amendment doctrinal analysis into this critically sensitive sociopolitical issue. This is an issue upon which the future viability of this nation, now encompassing over ***300 languages***, may rest.

As noted in the Petitioners' brief, "[w]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." *Haig v. Agee*, 453 U.S. 280, 309 (1981), *quoting Kennedy v. Mendoza-Martinez*, 372 U.S.

144, 160 (1963). As noted in a piece commenting on the decision of the initial three-judge panel of the Ninth Circuit Court of Appeals, "[i]t is absurd to maintain that our fundamental organic law mandates passivity in the face of progressive linguistic Balkanization." National Review, January 23, 1995, at 12, col.2. "As Justice Jackson said long ago, the U.S. Constitution is not a suicide pact. 'And that applies to national suicide, too." *Id.*; *see also Open Letter from National Review Editors, re: National Suicide*, National Review, November 6, 1995, (reviewing October, 1995 *en banc* decision).



## CONCLUSION

For the reasons stated, the Court should reverse the decision of the Ninth Circuit Court of Appeals; find that Article XXVIII of the Arizona Constitution is not violative of the First Amendment, and grant such additional relief as is necessary to implement this Court's decision.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH
and ROBERT D. PARK,

*Petitioners,*

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ;
JAIME GUTIERREZ; and ARIZONANS AGAINST
CONSTITUTIONAL TAMPERING,

*Respondents.*

**On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE WASHINGTON LEGAL FOUNDATION, THE CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY, 34 MEMBERS OF CONGRESS, AND THE STATE OF NEBRASKA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Alexis de Tocqueville, *Democracy in America* (Phillips Bradley ed. 1945) . . . . . 24

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) . . . . . 7

## INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with supporters in all fifty states. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in opposing intrusions by the federal government into decisions about the operations of state governments, where those decisions are properly reserved to the states' citizens. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court, as well as other courts across the country. For example, in *Wilson v. Voting Rights Coalition*, No. 95-673, WLF filed a brief supporting California in its litigation over the constitutionality of the unfunded mandates in the National Voter Registration Act of 1993, 42 U.S.C.A. § 1973gg-1 *et seq.* WLF also filed a brief before the lower court, sitting *en banc*, in the present litigation, as well as a brief on the petition for writ of certiorari before this Court.

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a nonprofit educational and research institution founded in 1979 and based in Claremont, California. The Claremont Institute seeks a return of America's founding principles to their rightful preeminence in our public life. It agrees with our Founding Fathers that the citizenry's adherence to America's central principles, coupled with an enlightened public discourse, is essential to successful republican government. The Claremont Institute believes that both are threatened by the fragmentation inherent in multiculturalism and multilingualism, and that Official English provisions help preserve the language of our political and legal traditions as the common tongue of all Americans, regardless of their heritage.

United States Representatives Charles T. Canady, Toby Roth, Henry J. Hyde, Bob Livingston, Bill Baker, Bob Barr, Bill Barrett, Doug Bereuter, Brian Bilbray, Thomas J. Bliley, Jr., Peter Blute, Sonny Bono, Ed Bryant, Jon Christensen, Wes Cooley, Philip M. Crane, Frank Cremeans, John T. Doolittle, Robert K. Dornan, Bob Goodlatte, Mel Hancock, Doc Hastings, Martin Hoke, Bob Inglis, Sue Kelly, Peter King, Joe Knollenberg, William Lipinski, Jan Meyers, Dana Rohrabacher, Ed Royce, Matt Salmon, Jim Sensenbrenner, Jr., and Charles H. Taylor are Members of Congress who oppose the ruling of the court below and who believe it should be reversed. These members are concerned by the decision's potential implications with respect to any future legislation on "Official English" by the states and by Congress. They are also concerned by the implications for government operations generally of the holding that public employees have a presumptive right under the First Amendment to determine how and whether to comply with official directives concerning "expressive" job functions.

Rep. Charles T. Canady is chairman of the Subcommittee on the Constitution of the House Judiciary Committee.

Rep. Toby Roth is the sponsor of H.R. 739, the Declaration of Official English Act, a bill to declare English as the official language of the United States Government. Many of the Members joining this brief are among the 94 current co-sponsors of H.R. 739.

Rep. Henry J. Hyde is chairman of the House Judiciary Committee.



Rep. Bob Livingston is chairman of the House Appropriations Committee.

The State of Nebraska, like the State of Arizona, has a provision in its state constitution declaring English to be the official language of the state. Neb. Const. art. I, § 27. The State of Nebraska is concerned about the implications of the decision below for the validity of its own state constitutional provision and any legislation or regulations adopted pursuant to it.

*Amici* believe that government policy, particularly in a diverse society such as ours, should promote the use of a common language. *Amici* further believe that it is desirable and constitutionally permissible for voters to determine that their government must act in that common language in most circumstances as a means of increasing government efficiency and furthering civic and social unity.

All parties have consented to the participation of the *amici*. Consent letters from counsel have been lodged with the Clerk of the Court.

## SUMMARY OF ARGUMENT

This is not a case in which the government has attempted to regulate the choice of language or other speech of private individuals.[1] Nor is this a case in which the government has attempted to limit the rights that government employees "otherwise enjoy as citizens to comment on matters of public interest," whether inside or

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[1] *Cf. Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down prohibition on foreign language instruction in parochial school).

outside of the workplace.[2] To the contrary, in this case the people have attempted to regulate only the language that the *government* speaks. The First Amendment simply does not apply in this context: neither government employees nor individual private citizens have a constitutional right to insist that the government use a particular language. Congress, for example, has reserved the right to decide if and when to use languages other than English, and from the earliest days of the Republic rejected proposals to translate its laws for the benefits of citizens not proficient in English.

In striking down Article XXVIII of the Arizona Constitution, the Ninth Circuit disregarded the compelling interests that justify Official English provisions. Like any employer, the government is entitled to specify the language of its own messages, as well as the language of the workplace generally, in order to ensure that its messages--its laws, regulations, policies, and judicial opinions--are uniformly and accurately conveyed, and that its employees are properly supervised. Moreover, the very diversity of the American work force may require English-only rules on the job as a palliative for the fear and distrust that use of other languages may foster.

Finally, Official English provisions further the interests not only of the government, but also of the public in general and those not yet proficient in English in particular. Healthy political life requires popular deliberation in a common tongue. The English language is

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[2] *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *see also United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1012 (1995) (rules as to government employees' "expressive activities in their capacity as citizens, not as Government employees").



not merely one appropriate vehicle for deliberation: it is the *most* appropriate vehicle, because it is the language of America's philosophical, political, and legal traditions, and conveys best the essence of the American way of popular self-government. By providing incentives to learn English, Arizona's constitutional provision also helps integrate those who now speak only other languages into the broader society and economy. The decision of the Arizona voters to add Article XXVIII to the state constitution deserves the utmost respect, and the decision below invalidating that amendment should be reversed.

## ARGUMENT

### I. Official Acts of Government Constitute the Speech of the Government, Not the Protected Speech of Public Employees.

#### A. Article XXVIII Does Not Violate the Rights of Government Employees.

The government, like corporations and other legal persons, operates only through human agency. For a state to speak, its words must be communicated by people, whether orally or in writing. When a public employee speaks in an official capacity, the employee is speaking the words of the government.[3] As this Court stated only last Term, "when the State is the speaker, it may make content-based choices." *Rosenberger v. Rector & Visitors of Univ.*

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[3] *See Youker v. Schoenenberger*, 22 F.3d 163, 166-67 (7th Cir. 1994) (contents of employee's letter sent in official capacity on township stationery over supervisor's signature was not employee's personal protected speech "as a citizen") (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

*of Va.*, 115 S. Ct. 2510, 2518-19 (1995). The Court reaffirmed that "we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 196-98 (1991)). If the government may regulate the content of its message when it is conveyed by "private entities," then *a fortiori* it may do so when its message is conveyed by its own personnel.

In adopting Article XXVIII, Arizona voters have done no more than regulate how their government speaks. By its terms, Article XXVIII applies only to official government functions. Subject to certain exceptions, it provides that "[t]his State and all political subdivisions of this State shall act in English and no other language," and that "[n]o governmental document shall be valid, effective or enforceable unless it is in the English language." Ariz. Const. art. XXVIII, § 3(1)(a), (c).[4] This applies to "all statutes, ordinances, rules, orders, programs and policies" of the State or its subdivisions or agencies. The amendment applies to government officials and employees only "during the performance of government business." *Id.* Since the only words that must be English are those of government agents when they are speaking for the government, government employees' First Amendment rights in their personal speech are in no way affected.[5]

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[4] One such exception is where use of other languages is necessary to comply with federal law. *Id.* § 3(2). The latter clause belies any assertion that Article XVIII violates the Civil Rights Act, the Voting Rights Act, or other federal statutes.

[5] *See Rust*, 500 U.S. at 198-99 ("The employees' freedom of (continued...)



In an effort to find some excuse for invalidating the entire initiative, some of the intervenors and Ninth Circuit judges have seized upon a minor wrinkle: they argue that Article XXVIII violates the rights of elected officials to communicate with their constituents in other languages. As elected government officials, the *amici* Members of Congress are sensitive to the need to communicate freely with constitutents. However, such concerns are groundless. From the face of Article XXVIII, the amendment's thrust is the regulation of official state publications and civil servants, not elected officials. Moreover, Article XXVIII is easily construed so as to avoid any impact on the personal political activities of elected officials.

Article XXVIII reflects a functional approach: it does not apply to all communications by individual elected officials, but rather applies to "the legislative, executive, and judicial branches of government" and to government officials only during the performance of their government business. Just as "Congressional 'business' . . . does not include every act performed by a member of Congress,"[6] Arizona's "government business" does not include every act of an elected official.

The "government business" of a legislator, for example, is only his or her legislative function. Both this Court and Arizona law distinguish between "legislative

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[5](...continued)
expression is limited during the time that they actually work on the project," but not when they are "acting as private individuals").

[6] Laurence H. Tribe, *American Constitutional Law* 370-71 (2d ed. 1988).

acts" and related "political matters." *United States v. Brewster*, 408 U.S. 501, 512 (1972); *see also* Restatement (Second) of Torts § 590 cmt. a (1977), *adopted in Sanchez v. Coxon*, 854 P.2d 126, 130 (Ariz. 1993). Legislative acts include actions that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972). This includes "conduct on the floor of the legislative body," as well as "the work of legislative committees or sub-committees that are engaged in an investigation or other work authorized by the legislative body, whether the work is performed while that body is in session or during a recess." Restatement § 590 cmt. a. Under Article XXVIII, such legislative functions must be performed in English.

By contrast, "government business" does not include an individual legislator's related activities that "are political in nature rather than legislative," including "legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assisting in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Brewster*, 408 U.S. at 512.[7] That such

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[7] *See also United States v. Helstoski*, 442 U.S. 477, 489 (1979) ("Promises by a Member to perform an act in the future are not legislative acts."); *Hutchinson v. Proxmire*, 443 U.S. 111, 130-33 (1979) (newsletters and press releases are "not a part of the legislative function"); Restatement § 590 cmt. a (legislative function does not include "activities incidentally related to legislative affairs but not part

(continued...)



conduct is outside of government business is demonstrated by the fact that private citizens--including political challengers--may engage in the same conduct.[8]

To the extent that Article XXVIII regulates the language used in legislative debates, it is not a unconstitutional limitation on the content of individual legislators' speech or their ability to comment on matters of public concern. Rather, it is a regulation of the mode or manner of speech required to allow the legislature to achieve its purpose. This Court has recognized that the government may regulate the speech of its personnel as required to facilitate its operations. *See Waters v. Churchill*, 114 S. Ct. 1878, 1886-88 (1994). The essence of the legislative function is deliberation; legislators cannot deliberate if they cannot understand each other. Indeed, under an Arizona constitutional provision mandated by Congress as a prerequisite to admission to the Union, "[t]he ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a

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[7](...continued)
of the legislative process itself").

[8] Thus, *Bond v. Floyd*, 385 U.S. 116 (1966), is distinguishable because that case involved the exclusion of a duly elected state legislator from membership in the legislature based on his statements on the Vietnam War and the draft, which were made outside of the legislature during a telephone interview with a local radio reporter. *Id.* at 122-23. Such statements would not be subject to Article XXVIII.

necessary qualification for all State officers and members of the State Legislature." Ariz. Const. art. XX, § 8.[9]

Similarly, to the extent that a non-legislative elected official undertakes official acts on behalf of the state, such as issuing veto messages or proclamations, promulgating regulations, making administrative determinations, or issuing judicial opinions, such actions must be conducted in English.[10] Article XXVIII does not purport to regulate such an official's communications on his own behalf, as those are political matters, not government business.

### B. Article XXVIII Does Not Violate the Rights of the Public.

At least in part, the Ninth Circuit's decision appears to be based on the insupportable proposition that individuals have a constitutional right to receive government services in a particular language. Such a right would turn the First Amendment on its head: it would become a means for compelling speech by an *unwilling* government speaker. No court has ever required such a

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[9] *See also* Ariz. Rev. Stat. Ann. § 11-402 (1990) (English competency requirement for county officers); Ariz. Rev. Stat. Ann. § 38-201(C) (1996) (same for state, county, city, town, and precinct officers).

[10] *Cf. Barr v. Mateo*, 360 U.S. 564, 573-75 (1959) (recognizing privilege for government officers so long as the publication is made in the performance of their duties); *Long v. Mertz*, 407 P.2d 404, 409 (Ariz. Ct. App. 1965) (adopting *Barr v. Mateo* and extending absolute privilege to statements of public officer "while doing an act in the course of his official duties which he is directed or authorized specifically by law so to do"); Restatement (Second) of Torts § 591 cmt. f (1977) (similar).



result: "Freedom of speech presupposes a willing speaker." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976). To the contrary, other courts considering this issue have firmly rejected constitutional claims that the government must act in languages other than English.[11]

Indeed, such a putative right has no historical basis. From the beginning, the United States has included significant bodies of citizens who spoke second languages, some exclusively; at the time of the Founding, German was the second most widely spoken language in the country.

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[11] *See Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1017 (9th Cir. 1978) ("[T]he Constitution neither requires nor prohibits the bilingual or bicultural education sought by the appellants. Such matters are for the people to decide."); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973) (government forms and services); *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994) (government notices); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983) (government forms and services), *cert. denied*, 466 U.S. 929 (1984); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (civil service examination for carpenters); *Vialez v. New York City Hous. Auth.*, 783 F. Supp. 109, 120-24 (S.D.N.Y. 1991) ("To accept plaintiff's contention that as a constitutional--rather than legislative--matter, plaintiff has a right to have certain documents written in Spanish would place an insurmountable and unjustified burden on the Housing Authority."); *Commonwealth v. Olivio*, 337 N.E.2d 904, 911 (Mass. 1975) ("This is not an officially multilingual country, and notification of official matters in the sole official language of both this nation and this Commonwealth is patently reasonable"); *Alfonso v. Board of Review*, 444 A.2d 1075, 1077 (N.J.), *appeal dismissed & cert. denied*, 459 U.S. 806 (1982) (decision whether to provide translation and in what language "is one that is best left to those branches of government that can better assess the changing demands of both the non-English-speaking population and the government agencies that provide the translation").

Almost contemporaneously with the passage of the First Amendment, Congress rejected appeals for the government to accommodate non-English speakers by providing government services in foreign languages. On January 13, 1795, the U.S. House of Representatives defeated a bill to print 3,000 sets of the federal laws in German "for the accommodation of such German citizens of the United States, as do not understand the English language." 4 *Annals of the Congress of the United States* 1082, *quoted in* Dennis Baron, *The English-Only Question* 88 (1990). Indeed, the decisive vote against bilingual publication was cast by the first Speaker of the House, Frederick Augustus Muhlenberg, a German-American from Pennsylvania, then the state with the largest German population. *Id.*

Nor was this a singular event. The following month, the House defeated a similar proposal, and passed a bill providing for publication of current and future statutes in English only. With Senate concurrence, President Washington signed the bill into law. *Id.* at 89. "On a number of occasions during the nineteenth century the Congress again rejected motions to print laws or other documents in German as well as English." *Id.* Similarly, in 1810 Congress rejected Michigan's petition to translate the federal laws into French. *Id.* at 90. Congress also rejected proposals to print copies of the President's annual message in German, Low German, or French in every year from 1843 to 1847. *Id.* at 91-92. In 1862, Congress rejected a bill to print copies of a Patent Office report on agriculture in German. *Id.* at 92.

Moreover, recognizing a right of citizens to demand that their government operate in languages other than English would create undue burdens on the operation of government. Over 300 languages are spoken in the United



States, and each speaker would have the same right to have government regulations rendered in his or her own language.[12] There is no principled distinction between recognizing rights in the second most widely spoken language and rights in any other of the many languages spoken in the United States today. *See Vialez v. New York City Housing Auth.*, 783 F. Supp. 109, 123 (S.D.N.Y. 1991).

That an individual government employee such as Maria-Kelley Yniguez may feel confident about her ability to communicate the government's message in another language does not relieve the burden on the public fisc or the interference with the government's efficient operation. Anyone who has tried to translate a legal document instantly confronts the distinction between fluency in the language of every-day life and command of the nuances of legalese or other technical jargon. The government should not have to accept the risk that even its employee's best efforts may not be good enough.

To the extent that there is a public interest in providing services in other languages, such determinations should be left to the political branches of government, and should not be a matter of constitutional fiat. No doubt the federal government or the states have found occasions to publish documents or send communications in languages

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[12] Indeed, federal regulations under the Voting Rights Act of 1965 require printed or oral voting assistance and ballots to be offered in various American jurisdictions in 31 American Indian languages, 2 Alaskan Native languages, and Spanish, French, Chinese, Japanese, Vietnamese, and Filipino. 28 C.F.R. pt. 55 app. (1995). The number of languages required is limited by complex demographic thresholds. 28 C.F.R. § 55.5 (1995).

other than English, *e.g.*, Radio Free Europe and Radio Marti. The executive and legislative branches have always had the prerogative to determine if, when, and where government should use other languages.[13] Until now, courts have not intruded on such decisionmaking authority in the name of constitutional imperatives. This case should not be an exception.

### C. The Decision Below Commits Government Language Policy to the Whim of Individual Government Employees.

The Ninth Circuit's decision below does not merely give constitutional status to multilingualism. By recognizing new First Amendment rights of government employees and officials to make their own language choice, the Ninth Circuit has removed language policy from the hands of the voters and their government and placed it in the hands of each individual employee or officeholder.

This is a sword that cuts in both ways. For every government employee who eschews Official English there is one that rejects bilingualism. By recognizing the right of an individual civil servant to speak the language of his or her choice on the job, the Ninth Circuit allows government employees to thwart multilingual policies just as well as monolingual ones. There is simply no principled distinction between allowing a government employee unilaterally to reject government policies underlying

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[13] Thus, in *Lau v. Nichols*, 414 U.S. 563 (1974), the Court required the public school district to provide assistance of some kind to Chinese-speaking students based the Civil Rights Act of 1964 and the administrative regulations promulgated thereunder, *not* on constitutional considerations. *Id.* at 566-69.



Official English while prohibiting them from doing the same to the policies underlying the Voting Rights Act. Insubordination is not a creature easily tamed once loosed: the "force" of the Ninth Circuit's view "will turn government employment into a platform for endless attacks on government policy and governance into a tug of war between those who make the laws and those who enforce them." *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 962 (9th Cir. 1995) (Kozinski, J., dissenting).

This is by no means a farfetched hypothetical situation. Bilingual employees in Arizona have sued a municipal agency on the ground that they should not be compelled to speak Spanish on the job--at least not without being paid more than monolingual employees for their trouble. *Cota v. Tucson Police Dep't*, 783 F. Supp. 458 (D. Ariz. 1992). Bilingual employees with Yniguez's strength of conviction but polar-opposite views may well refuse to speak their second languages in order to affirm their Americanness. In the words of a contemporary Mexican-American writer:

> I entered this country through the language and I am not mistaken about my journey's meaning. I understand why Americans hold tightly to the language. It is because we are afraid of losing our gain. With a convert's certainty, I believe that America can have but one public language. Like other Americans I claim the language as a prize. Though privately we are different from one another in the color and sound of our memory, a shared public language gives breath to our union. . . . I will never regret that American English is what I speak.

Richard Rodriguez, *Unilingual, Not Unilateral*, Wall Street J., June 25, 1985.[14]

Such choices about the operation of government are political decisions that should be made by the government itself or the people, not individual employees. The Ninth Circuit has essentially turned the principles of the Constitution upside down, giving public officials the discretion to decide whether they wish to carry out their duties in the democratically determined manner, their wishes subject only to the approval or disapproval of the courts. The Framers of the Constitution sought to create a form of government in which the will of public officials as to the manner in which they carried out their official duties would ultimately be subordinate to the will of the people as expressed through the democratic process--not the other way around. This Court should reverse the Ninth Circuit's atomization of government language policy and put control over the operation of government back into the hands of the people and the democratic process.

## II. Official English Rules Serve Legitimate Interests of the Government as an Employer.

The Ninth Circuit has shown little regard for the strong public policies underlying Official English provisions. Some of the considerations reflect operational concerns that government and private employers share. This Court has recognized that the government, as an employer, may seek to maintain order and discipline in the

[14] *See generally* Francois Grosjean, *Life with Two Languages: An Introduction to Bilingualism* 110-112 (1982) ("[M]any immigrants want their children to assimilate as quickly as possible, and hence either do not reinforce the [native] language or actually forbid its use.").



workplace in the same manner as a private employer. *Waters*, 114 S. Ct. at 1886. Control over the language used by employees advances two principal concerns of employers public and private: (i) the need to communicate clearly and efficiently, and to supervise employees properly; and (ii) the need to ensure workplace tranquility in light of a diverse workforce. Other courts, including the Ninth Circuit, have recognized the legitimate interests behind workplace English-only policies in the private setting.[15] The Ninth Circuit below erred in not doing the same in the public setting.

### A. The Employer's Need to Communicate Clearly and Efficiently and Maintain Workplace Discipline.

An employer has a strong interest in maintaining the uniformity and coherence of its message. Without the ability to mandate a specific language for communicating with the public, the employer seeking to maintain the coherence of its message would be compelled to hire translators to adapt its sales literature, customer service scripts, and other message texts into whatever languages an employee saw fit to speak. Even then, translation is an imperfect art, and employers would be placed in jeopardy

[15] *See Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (striking down EEOC rules against English-only workplace policies), *cert. denied*, 114 S. Ct. 2726 (1994); *Jurado v. Eleven-Fifty Corp.*, 813 F. 2d 1406 (9th Cir. 1987) (employer could require radio announcer to use only English); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981) (employer could require use of English by non-English-speaking employee); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (employer could require use of English by bilingual employee), *cert. denied*, 449 U.S. 1113 (1981).

of mistranslation or loss of nuance.[16] Thus, in *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *reh'g denied*, 861 F.2d 1187 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989), the Los Angeles Municipal Court justified its internal rule requiring use only of English on the ground that supervisors who do not speak the other language "cannot discern whether employees are correctly disseminating information unless English is spoken." 838 F.2d at 1043.

Like a private employer, the government has a recognized interest in choosing language that will "ensure that its message is neither garbled nor distorted." *Rosenberger*, 115 S. Ct. at 2519. Those concerns are heightened because the government's "message" frequently has the force of law. "Words inevitably contain germs of uncertainty," *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973), and promulgating laws, regulations, and decisions in only one language is trouble enough. Translating terms, particularly legal terms, into another language can be extremely difficult, even for parties generally conversant in both tongues for every-day matters. Official English provisions essentially allocate the risk of mistranslation between the state and the non-English-speaking public; here, Arizona has accepted the burden where life and limb

[16] *Cf. Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 451 & n.2 (3d Cir. 1987) (libel action based on newpaper's translation of litterer as "cerdos," Spanish for "pigs"); *United States v. Perez*, 658 F.2d 654, 662-63 (9th Cir. 1981) (bilingual juror dismissed because of angry dispute over court interpreter's translation).



are at stake by allowing certain government acts to be undertaken in other languages.[17]

Recognizing a right of the public to receive government services--or the right of government employees to render such services--in another language would impose extraordinary stresses on government resources. These would include translating government works into foreign languages, hiring or paying for interpreters, and somehow managing to maintain a consistency of meaning in several languages. In rejecting the proposed translation of the federal laws into French, Congress concluded nearly two centuries ago, in words equally true today, that "[g]reat inconvenience and confusion might result from having two separate texts for the same law, susceptible, as they necessarily would be from the imperfection of all languages, of different and perhaps opposite interpretations." 21 *Annals of Congress* 1886, *quoted in* Baron, *supra* p. 12, at 90. While such multilingualism may be necessary in international bodies such as the United Nations, that interpreter-dependent institution is hardly a model for the U.S. Congress, much less Arizona's state government.

The debate over Official English often ignores the fact that most government agencies already conduct their business only in English and require communications to be in English by unstated practice if not formal rule.[18] "Congress conducts its affairs in English, [and] the

[17] Article XXVIII provides for several exceptions to the English-language rule, including matters relating to "public health or safety" and the protection of "criminal defendants or victims of crimes." Ariz. Const. art. XXVIII, § 3(2).

[18] *E.g.*, 37 C.F.R. § 2.31 (1995) (application for trademark registration "must be in the English language").

executive and judicial branches of government do likewise." *Soberal-Perez v. Heckler*, 717 F.2d 36, 42-43 (2d Cir. 1983). "'No Continental American court, federal or state, has ever conducted its proceedings in any language other than English.'" *United States v. Ramos Colon*, 415 F. Supp. 455, 465 (D.P.R. 1976) (three-judge court) (quoting *United States v. Valentine*, 288 F. Supp. 957, 963-64 (D.P.R. 1968)). It is difficult to imagine any federal or state court accepting a brief written only in Tagalog from a Filipino party acting *pro se* who could not speak English; it is similarly inconceivable that the Judicial Conference would permit mischievous federal judges to issue their opinions solely in Romanian.

Indeed, Congress and the federal judiciary have deemed themselves constitutionally empowered to mandate the use of English. Federal law requires that "[a]ll pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language." 48 U.S.C.A. § 864 (1987). That provision has been upheld though the primary language of most American citizens in Puerto Rico is Spanish. *United States v. Valentine*, 288 F. Supp. 957 (D.P.R. 1968). Under the rules of the U.S. Court of Appeals for the First Circuit, on appeal "[t]he court will not receive documents not in the English language unless translations are furnished." 1st Cir. R. 30.7 (1996). This Court also requires translations of "material written in a foreign language." Sup. Ct. R. 31.

Maintaining coherence of the message is just one aspect of the employer's need to maintain adequate supervision and discipline in the workplace. Supevisors must from time to time give instructions to their subordi-



nates on how to perform their jobs, or on what steps to take to respond to workplace emergencies. Indeed, it is an increasingly common experience that an employer will monitor employees' communications with the public to check on the quality of the employees' customer service. This may be impossible where, as in respondent Yniguez's circumstances, the supervisor does not speak the second language used by the employee. *See Gutierrez*, 861 F.2d at 1187, 1188 (Kozinski, J., dissenting from denial of reh'g en banc) (English-only rule was "intended to assist 'supervisors to understand the work conversations of their subordinates'").

Coping with the need to supervise employees who speak in different languages on the job poses its own problems. "[G]iving employees the nearly absolute right to speak a language other than English . . . will . . . force employers to establish separate supervisorial tracks for employees who choose to speak another language during working hours." *Id.* The resulting balkanization of the work force interferes with the employer's efficient operating by impairing its ability to freely reassign employees in response to business needs.

Arizona's Official English provision recognizes that the government can do its job most coherently and efficiently when all of its personnel are working in the same language. That recognition is entitled to respect, not the short shrift given by the court below. "The government interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it is a sovereign to a significant one when it is an employer." *Waters*, 114 S. Ct. at 1888.

### B. The Employer's Need to Maintain Workplace Harmony

The very diversity of the American work force may require adoption of English-only policies. Allowing groups in the workplace to use different languages not understood by coworkers may breed suspicion and animosity over whether the other languages are used to encrypt ridicule or even sexual harassment. The employer may institute an English-only rule seeking only to allay fears and distrust. Indeed, in *Gutierrez*, the "English only rule was not adopted by the Municipal Court judges out of xenophobia, but in response to a 'complaint from a black female employee concerning the use of the Spanish language between employees in order to conceal the substance of conversation during working hours on the work floor.'" *Gutierrez*, 861 F.2d at 1187, 1188 (Kozinski, J., dissenting) (quoting declaration of Municipal Court Chief Clerk). This is hardly a unique occurrence. *See Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (similar), *cert. denied*, 114 S. Ct. 2726 (1994); *McNeil v. Aquitos*, 831 F. Supp. 1079 (S.D.N.Y. 1993) (black nurse felt isolated, harassed, and impaired in doing her job effectively, thus endangering infant's life, because other nurses spoke Tagalog on duty).

By comparison to policies adopted by other employers, Article XXVIII takes a measured approach: it does not attempt to limit casual workplace conversations in other languages, but merely regulates the manner in which official acts and functions of the state are conducted. Both public and private employers should be free, however, to promulgate language-related rules as they are dictated by the operational needs of their workplaces.



## III. Official English Rules Are Justified by the Public Interest.

### A. A Common Language of Political and Legal Discourse Benefits the Public.

The State of Arizona, like the federal government and other state governments, has sovereign interests in preserving English as the common, official language of government quite apart from its interests as an employer. These include preserving social and political cohesion and avoiding linguistic fragmentation. As the Court has noted, "shared language can serve to foster community." *Hernandez v. United States*, 500 U.S. 352, 371 (1991).

Healthy political life becomes impossible in the absence of a common tongue. Politics requires deliberation, and deliberation requires that those deliberating understand each other; such understanding is difficult, if not impossible, where the deliberators do not speak the same language.[19] This is even more true in a democracy, where the people are sovereign, and government is not the preserve of a favored few, but the purview and the responsibility of the people as a whole. To fulfill that responsibility, the people as a whole must be able to deliberate amongst themselves, and to deliberate, they must be able to communicate. This is impossible in the absence of a common tongue.

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[19] It is telling that in ancient Greek, the language in which political science was born, the word for "speech" and "reason" is the same: *logos*. There can be no reasoning without speech, without language, without a medium in which to develop that reasoning. Similarly, there can be no communication of the fruits of reasoning without a common language.

The very special case of the United States makes a common language even more imperative. More than 150 years ago, Alexis de Tocqueville noted that one "circumstance which makes it easy to maintain a Federal government in America" is "a common language." 1 *Democracy in America* 175-76 (Bradley ed. 1945). Tocqueville observed that "[a] certain uniformity of civilization is not less necessary to the durability of a confederation than a uniformity of interests in the states that compose it." *Id.* America's commonality of civilization, undergirded by its commonality of language, left "Maine and Georgia, separated by a distance of a thousand miles, more naturally united than Normandy and Brittany," which "are separated only by a brook." *Id.* at 171, 176. Even today, "a common language is a necessary bond of national cohesion in so heterogenous a nation as America." Arthur M. Schlesinger, Jr., *The Disuniting of America* 110 (1992).

America's need for a common language is unique not only because of its geographic expanse. Unlike every other nation in the history of the world, ours is a nation formed not on the basis of ancestry, common borders, or "culture," but rather on the basis of principles. Those principles are derived from reason itself and are therefore accessible to all men in all times. But they were articulated in a particular language--an accident perhaps, but an ineluctable reality. The cornerstones of the American political and legal experience have been in English: the Mayflower Compact, the Declaration of Independence, the Federalist Papers, the Constitution, the Northwest Ordinance, the Gettysburg Address, and, not the least, two centuries of this Court's own jurisprudence.

Those documents contain many of the maxims that express the core of the American idea, and that the



Founders intended to become part of the language, part of the mental make-up of every citizen. These philosophical, political, and legal concepts, expressed in often poetic terms in the English language, have become embedded in the American civic mind and attained talismanic significance: *all men are created equal*; *Life, Liberty, and the Pursuit of Happiness*; *if men were angels, there would be no need for government*; *in order to form a more perfect Union*; *due process of law*; *equal protection of the laws*; *government of the people, by the people, for the people*. Such maxims and principles are the tie, or as Lincoln put it, the "electric cord" that binds us together: they make us, the children of immigrants, the "blood of the blood, and flesh of the flesh" of the Founders who came before us.[20]

In carrying forward these principles, the English language is historically intertwined with a political tradition reaching far outside the United States both spatially and temporally. Thus, Sir Winston Churchill recognized that the American "Constitution was a reaffirmation of faith in the principles painfully evolved over the centuries by the English-speaking peoples." 3 Winston S. Churchill, *A History of the English-Speaking Peoples* 256 (1957). The vitality and importance of America's linguistic connection with other English-speaking peoples is demonstrated by our continuing reliance on the common law shared by those peoples and inherited by the United States.[21]

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[20] Abraham Lincoln, *Abraham Lincoln: Speeches and Writings 1832-1858*, at 456 (1989).

[21] American law students still learn contract law by studying *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1856). This Term, the Court sought guidance from English case law from the time

(continued...)

For the principles to have effect, for this nation to work, we must all be able to discuss our political heritage, the foundations of our rights, the nature of our duties, together. And to do this, we must share a common language. Understanding and digesting those maxims and the principles that inform them as the Founders of our nation did requires that we read and understand their words as they spoke and wrote them, and this requires that we--all of us--understand English.

Perpetuating such principles through a multitude of languages is a problematic enterprise. Many of the maxims that we cherish suffer in translation: nuance of meaning is lost, along with the poetic resonance that testifies to their philosophical depth and grandeur. "[L]anguage colors the depths of our consciousness. It is the medium that dominates perceptions, organizes categories of thought, shapes ideas and incorporates a philosophy of existence." Arthur M. Schlesinger, Jr., *The Cycles of American History* 433 (1986). "The language-field of the Founding Fathers directed the American consciousness toward one constellation of standards and purposes," *id.*, and the English language is the particular lens through which Americans view that universal constellation of principles. *See Guadalupe Org.*, 587 F.2d at 1027. To help preserve the distinctly American vision of universal principles, the people have the right to insist that the government use the language of the American political tradition.

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[21](...continued)
of the adoption of the Seventh Amendment through the 1850s in deciding whether patent construction was an issue for the court or for the jury. *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1390-92 (1996).



**B. Official English Policies Benefit Non-English Speakers by Encouraging English Proficiency.**

While the United States may have yet preserved its common language without express declarations that English is the official language, the nation faces new challenges to the durability of its common ground. "A cult of ethnicity has arisen both among non-Anglo whites and among nonwhite minorities to denounce the idea of a melting pot, to challenge the concept of 'one people,' and to protect, promote, and perpetuate separate ethnic and racial communities." Schlesinger, *The Disuniting of America*, *supra* p. 24, at 15. This "reverses the historic theory of America as one people--the theory that has thus far managed to keep American society whole. . . . The multiethnic dogma abandons historic purposes, replacing assimilation by fragmentation, integration by separatism. It belittles *unum* and glorifies *pluribus*." *Id.* at 15-16.

One perceived area of threat to American unity is in the area of language. "The historic idea of a unifying American identity is now in peril in many arenas," including "our language." *Id.* at 17. As a recent Congressional report noted,

> [i]f language and cultural separatism rise above a certain level, the unity and political stability of the nation will--in time--be seriously diminished. Pluralism within a united American nation has been the single greatest strength of this country. This unity comes from a common language and a core public culture of certain shared values,

> beliefs, and customs which make us distinctly "Americans."

S. Rep. No. 132, 99th Cong., 1st Sess. 7 (1985).

In this sense, the United States now must address concerns that other countries have long faced. Many of them have experienced language-driven political instability with only two linguistic groups, including Canada (English and French) and Belgium (Flemish and French). *See Gutierrez*, 861 F.2d at 1192-93 (Kozinski, J., dissenting). With hundreds of languages being spoken, the United States may face even greater risks. The very heterogeneity of the American population "makes the quest for unifying ideas and a common culture all the more urgent." Schlesinger, *The Disuniting of America*, *supra* p. 24, at 19.

Linguistic fragmentation also tends to exacerbate other societal divisions. *See Guadalupe Org.*, 587 F.2d at 1027; *Gutierrez*, 861 F.2d at 1192-93 (Kozinski, J., dissenting). Populaces divided by language tend to fracture socioeconomically along the same lines, with elite groups speaking one language and disadvantaged classes speaking another. Such concurrent cleavages increase stratification of society and decrease social mobility, as lower classes find themselves impaired in moving ahead by their lack of English language skills.

To the extent that Official English provisions encourage all citizens and aliens to learn English in order to deal with the government, such provisions have an inclusive rather than exclusive effect. They indirectly ease the integration of non-English speakers into schools, the job market, the economy, and society. Whatever obstacles immigrants may face in the short run are more than



justified in the long run by the democratizing and unifying effects of a common language. In this respect, Official English provisions merely continue longstanding American public policy. Federal law has long required, with limited exceptions, proof of an understanding of the English language as a prerequisite for naturalization. *See* 8 U.S.C.A. § 1423(a) (Supp. 1996). Even illegal aliens seeking only permanent residence must learn or at least study English. 8 U.S.C.A. § 1255a(b)(1)(D) (Supp. 1996).

The arguments against Official English proposals are essentially variations on the argument for bilingual education: providing government services in other languages will allow those not proficient in English to move ahead while they gain such proficiency. But that policy choice is not of constitutional dimension, and likely is not even correct. While the evidence is mixed, "indications are that bilingual education retards rather than expedites the movement of Hispanic children into the English-speaking world and that it promotes segregation more than it does integration." Schlesinger, *Disuniting of America*, *supra* p. 24, at 108; *see generally* Rosalie Pedalino Porter, *Forked Tongue: The Politics of Bilingual Education* 59-84 (1990). As one Mexican-American writer has noted, "[t]hose who have the most to lose in a bilingual America are the foreign-speaking poor, who are being lured into a linguistic nursery, quite apart from power and money in English-speaking America." Richard Rodriguez, *supra* p. 16.

Moreover, English proficiency will only grow in importance as the world shrinks. "English is the undisputed lingua franca of the business world." *The Economist*, May 16, 1987, at 71. German and Chinese business partners communicate in English; Swedish multinational corpora-

tions and investment houses produce internal memos and conduct board meetings in English; Japanese employees abroad speak to each other in English. *Id.* The Ninth Circuit's decision rejects English as a necessary common language at the same time that the rest of the world is embracing it as such. Those lured into complacency by the court's decision will end up even worse off.

Arizona has chosen to encourage proficiency in the English language by operating its government only in the English language. "National unity as an end which officials may foster by persuasion and example is not in question." *Texas v. Johnson*, 491 U.S. 397, 418 (1989). The people of Arizona have not acted with a hardened heart, however. Article XXVIII expressly permits the use of other languages where necessary for "public health or safety," to protect the rights of both "criminal defendants" and "victims of crimes," and to provide transitional bilingual education. Ariz. Const. art. XXVIII, § 3(2). While some may quibble with the ultimate effectiveness or fairness of a policy that accepts short-term inconveniences as the price of long-term benefits, such matters are properly assigned to the political branches and the voters. This Court should uphold Article XXVIII and return control over government language policy to where it belongs.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision below of the United States Court of Appeals for the Ninth Circuit.



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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ARIZONANS FOR OFFICIAL ENGLISH
and ROBERT D. PARK,

*Petitioners,*

*v.*

STATE OF ARIZONA, MARIA-KELLEY F. YNIGUEZ,
JAIME P. GUTIERREZ, and ARIZONANS AGAINST
CONSTITUTIONAL TAMPERING,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## BRIEF OF HUMAN RIGHTS WATCH, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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## BRIEF OF HUMAN RIGHTS WATCH, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

This *amicus* brief is submitted, with the consent of counsel for all parties, on behalf of Human Rights Watch.

## THE INTEREST OF HUMAN RIGHTS WATCH AS *AMICUS CURIAE*

Human Rights Watch is an independent nongovernmental organization established in 1978 to monitor and promote the observance of internationally recognized human rights in Africa, the Americas, Asia, the Middle East and among the signatories of the Helsinki Accords. It is the largest international human rights organization based in the United States. In working to promote respect for human rights, Human Rights Watch investigates, documents and publicizes human rights violations throughout the world. It has concluded fact-finding missions in scores of countries and published hundreds of reports of its findings. By exposing and calling attention to human rights abuses, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and thus to encourage an end to abusive practices.

The Human Rights Watch Free Expression Project (formerly known as the Fund for Free Expression) has been monitoring the issue of language rights for several years and, in fact, has published one report specifically covering disturbing trends affecting the right to speak a non-English language in the United States. *See* Fund for Free Expression, *"English-Only": The Attack on Minority Language Speakers in the United States* (1992). In addition, through its regional divisions, Human Rights Watch has monitored the repression of linguistic minorities in countries ranging from Sri Lanka to Bulgaria. The results of this monitoring have been published in numerous books and reports, which, taken as a whole, attest to the compelling link between language repression and efforts to repress linguistic minorities' ethnic and cultural identity. *See, e.g.*, Human Rights Watch, *Slaughter Among Neighbors: The*

*Political Origins of Communal Violence* (1995); Helsinki Watch, *Destroying Ethnic Identity: The Turks of Bulgaria* (1986).

Human Rights Watch's organizational mission, informed by a detailed knowledge of the nature and extent of the repression of linguistic minorities around the world, leads it to be concerned about the outcome of this case—an outcome that will send a powerful message about this country's position on linguistic human rights.

## SUMMARY OF ARGUMENT

Article XXVIII of the Arizona Constitution employs unacceptable means to establish English as the "official" language of the State of Arizona. In contrast to the aspirational tone of its Section 2, which urges the state "to preserve, protect and enhance the role of the English language," Article XXVIII "promotes" the use of English by virtually banning from the public sector the use of all other languages, including those spoken by Arizona's sizeable community of linguistic minorities. By so doing, Article XXVIII unreasonably restricts the ability of non-English speakers to communicate with their government, thereby infringing their right to freedom of expression, and discriminates against them by erecting needless obstacles to their access to government, public services and education.

The repressive and discriminatory means Article XXVIII employs to promote the use of English render it incompatible with international human rights standards, specifically, those governing language rights and the rights of linguistic minorities. These standards, embodied in binding international treaties, as well as international declarations, resolutions and recommendations, not only prohibit discrimination against linguistic minorities, but affirm the right of *all* individuals to use their own languages in a variety of public and private arenas. Article XXVIII, by effectively banning communications between non-English speakers and multilingual government employees, is profoundly inconsistent with these international standards.



The justifications for Article XXVIII urged by the petitioners—specifically, the promotion of Arizona's legitimacy and unity—are not borne out by the experience of the international community. Indeed, past experience overwhelmingly demonstrates that restrictive language policies produce effects directly contrary to the state interests that the petitioners believe Article XXVIII would serve. As history shows, restrictions on the use of minority languages have figured prominently in the policies of the world's most repressive regimes—often as part of campaigns to marginalize, persecute or forcefully assimilate disfavored ethnic and cultural minorities. Arizona cannot enhance its legitimacy by pursuing policies emblematic of oppression. Furthermore, as numerous examples attest, restrictive language policies—far from fostering internal unity—inspire resistance, balkanization and discord, often leading to violent conflict between linguistic minorities and members of the dominant language group.

Article XXVIII's unjustifiable indifference to widely-recognized international human rights standards stands in stark contrast to this nation's historical commitment and leadership with respect to the protection of human rights—a fact which should inform the Court's decision in this case. It would indeed be regrettable if a measure so clearly inconsistent with this nation's international obligations were permitted to stand.

## ARGUMENT

### I. ARTICLE XXVIII IS INCONSISTENT WITH INTERNATIONAL STANDARDS REGARDING LANGUAGE RIGHTS

#### A. The Importance of Language Rights

Language rights are basic human rights.[1] Because language is both a rudiment of human consciousness[2] and one of the major sources of cultural identity, the protection of language rights is essential to the protection of human dignity.[3] Consequently, the deprivation of language rights constitutes a fundamental human rights violation.

Language rights have been defined to include, among other things: the right to use one's own language;[4] the ability to identify positively with one's mother tongue and have that identification respected by others—whether one's mother tongue is a majority or a minority language;[5] and freedom from both individual and group discrimination on the basis of language.[6] Linguistic majorities, *i.e.*, speakers of a dominant language, typically enjoy the full spectrum of language rights. By contrast, linguistic minorities throughout the world must constantly contend with state efforts to deprive them of their language rights.[7]

The poverty of language rights experienced by many linguistic minorities is due, in large part, to the historical and widespread repression of minority languages by speakers of dominant languages. Repression of minority languages is almost always motivated by the desire to repress, marginalize or forcibly assimilate the *speakers* of those languages, who are often perceived as threats to the political unity and territorial integrity of the state.[8] Such repression need not be violent to be effective. It can be achieved, for example, by denying linguistic minorities opportunities to employ their mother tongues, or by mandating that community processes and enterprises—especially those involving knowledge and power—be conducted exclusively in languages alien to certain members of the community.[9]

The deprivation of language rights is particularly pernicious because language is so central to the human experience. Consequently, the loss of language rights often entails the loss of other rights as well, including freedom of expression, due process, the right to vote, the right to fair political representation, the right to a fair trial, access to education,

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[1] *See* Robert Phillipson, Mart Rannut & Tove Skutnabb-Kangas, *Introduction* to *Linguistic Human Rights: Overcoming Linguistic Discrimination* 1-3 (Tove Skutnabb-Kangas & Robert Phillipson eds., 1994) [hereinafter Phillipson] (discussing the concept of "linguistic human rights"); Mala Tabory, *Language Rights as Human Rights*, 10 Isr. Y.B. on Hum. Rts. 167 (1980).

[2] Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* 713 (1980) [hereinafter McDougal].

[3] Joseph P. Gromacki, *The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights*, 32 Va. J. Int'l L. 515 (1992).

[4] *Id.* at 516; Manfred W. Wenner, "The Politics of Equality Among European Linguistic Minorities," *in Comparative Human Rights* 184, 193 (Richard P. Claude ed., 1976); Tove Skutnabb-Kangas, *Language, Literacy and Minorities*, A Minority Rights Group Report, Nov. 1990, at 9. Both Wenner and Skutnabb-Kangas argue that the right to use one's own language *vis-à-vis the government* should be considered a basic linguistic human right.

[5] Phillipson, *supra* note 1, at 2.

[6] Gromacki, *supra* note 3, at 516.

[7] *See* Phillipson, *supra* note 1, at 1-2.

[8] *Id.* at 4-5; 2 Alexander Ostrower, *Language, Law, and Diplomacy: A Study of Linguistic Diversity in Official International Relations and International Law* 665-67 (1965).

[9] McDougal, *supra* note 2, at 714.

access to information, and the right to cultural identity.[10] The right to vote, for example, means nothing if the voter cannot understand the ballot.[11] Similarly, due process inherent in a judicial or administrative proceeding becomes hollow if the proceeding is held exclusively in an official language that the petitioner does not understand.[12]

### B. International Protection for Language Rights

The international human rights community has responded vigorously to the widespread violation of language rights. Since the end of World War I, protection for language rights and the rights of linguistic minorities has figured prominently in numerous sources of international human rights law. Some of the most important protections are found in treaties to which the United States is a party. Others appear in international declarations, resolutions and recommendations. Although these instruments, unlike treaties, are not technically binding, they establish broadly recognized standards for and inform the conduct of the United States and other nations with respect to linguistic human rights.

International instruments contain two different classes of language rights provisions. The first class consists of provisions that identify language as an impermissible basis of discrimination. These nondiscrimination provisions are profoundly offended by Article XXVIII's impairment of the ability of linguistic minorities to do what the State's English-speakers may continue to do, namely, communicate with State employees in a language understood by *both* participants to the conversation. As one scholar has observed:

> [B]y limiting the language of government services, a state imposes a condition on access to those services. By so doing, a state is creating an inequality between those for whom the language of service is their primary language, and those for whom it is not. The former have no difficulties in complying with this condition for access to the services, whereas the latter will, either because they do not understand the language, because they have difficulty in responding properly in the language, or even because it imposes on them an additional burden in exercising their right to these services. In other words, there is a distinction based on language that creates an inequality between two groups of individuals. This distinction may in addition constitute discrimination if it is not reasonable or justifiable in the particular circumstances of the case.[13]

The second class of provisions includes *affirmative* protections for language rights. Interpreted expansively, these provisions guarantee the right to transmit and receive information in one's own language. Interpreted narrowly, they prohibit governments from obstructing communications between a willing speaker and a willing listener. Under either interpretation, these provisions would condemn the unreasonable restrictions Article XXVIII imposes on the use of languages other than English.

### C. Sources of Protection for Language Rights in International Law

Although the international instruments protecting language rights and the rights of linguistic minorities number several dozen, it suffices to recall those that most clearly demonstrate Article XXVIII's incompatibility with international human rights law and this country's obligations thereunder.

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[10] *Id.* at 717-18; Phillipson, *supra* note 1, at 2; Gromacki, *supra* note 3, at 519, 534-35.

[11] *See* McDougal, *supra* note 2, at 717 & n.19.

[12] *Id.* at 718.

[13] Fernand de Varennes, *Language and Freedom of Expression in International Law*, 16 Hum. Rts. Q. 163, 175 n.41 (1994) (concluding that an Irish policy requiring English-speaking civil servants to submit their applications for children's allowances on a form written in the Irish language arguably violated Article 26 of the International Covenant on Civil and Political Rights, discussed *infra* note 31 and accompanying text, which prohibits discrimination on the basis of language).

### 1. The United Nations Charter and The Universal Declaration of Human Rights

The United Nations Charter, entered into force on October 24, 1945, contains four provisions directing the U.N. to promote respect "for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[14] Consistent with this mandate, the U.N. General Assembly, on December 10, 1948, adopted the Universal Declaration of Human Rights.[15] Although initially only declaratory, the Declaration, due to its widespread acceptance, has arguably achieved the status of binding customary law.[16]

Article 2 of the Declaration provides that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . language"—a provision fortified by the equal protection guarantee of Article 7. Although the Declaration contains no provision expressly protecting the right to use one's own language, such protection is readily inferred from other provisions. Article 19, for example, guarantees the freedom of expression, which "includes [the] freedom . . . to seek, receive and impart information." As one scholar has observed, "anchored" in Article 19 is "the right of any group to use its own language."[17] Similarly, Article 26, which governs the right to education, would be "non-sensical were it to exclude

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[14] U.N. Charter art. 1, ¶ 3; art. 13, ¶ 1(b); art. 55(c); art. 76(c).

[15] G.A. Res. 217 A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71-77 (1948).

[16] *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 882-83 (2d Cir. 1980) (and sources cited therein); *Fernandez* v. *Wilkinson*, 505 F. Supp. 787, 796-97 (D. Kan. 1980) (and sources cited therein), *aff'd*, 654 F.2d 1382 (10th Cir. 1981); Humphrey Waldock, "Human Rights in Contemporary International Law and the Significance of the European Convention," *in The European Convention on Human Rights* 1, 15 (Brit. Inst. of Int'l & Comp. L. ed., 1965).

[17] J.J. Lador-Lederer, *International Group Protection: Aims and Methods in Human Rights* 25 (1968).



development of the vernacular features of the community."[18] Other rights secured by the Declaration—including the right "of equal access to public service," the right "to take part in the Government of [one's] country," the right "to an effective remedy by the competent national tribunals," and the right "to a fair and public hearing by an independent and impartial tribunal" with respect to criminal charges[19]—would be rendered hollow if they did not include, at the very least, the right to use the language with which one is familiar and proficient.

### 2. The Sub-Commission on Prevention of Discrimination and Protection of Minorities

Established in 1946 by the U.N. Commission on Human Rights, the Sub-Commission, in addition to its other duties, has been charged with the responsibility

> to undertake studies, particularly in the light of the Universal Declaration of Human Rights, concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and *linguistic* minorities.[20]

The Sub-Commission's mandate, which contemplates the *protection* of linguistic minorities, thus exceeds the more modest directive of Article 2 of the Universal Declaration, which prohibits discrimination on the basis of language.

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[18] *Id.*

[19] Universal Declaration of Human Rights, *supra* note 15, art. 21, ¶ 2; art. 21 ¶ 1; art. 8; art. 10.

[20] CHR Res. on the Prevention of Discrimination and the Protection of Minorities, *in Report of the Commission on Human Rights in 1949*, 5th Sess., U.N. Doc. E/1371, ¶ 13, § A (1949) (emphasis added). The Sub-Commission regards the repression of linguistic minorities as a serious breach of international law. For example, on August 20, 1993, it passed a resolution condemning the state of Kosova for "banning of the use of the Albanian language, notably within the public administration and services," a practice which the Sub-Commission regarded as "a form of ethnic cleansing." U.N. Doc. E/CN.4/1994/2; E/CN.4/Sub.2/1993/45, at 36.

The Sub-Commission has pursued this ambitious mandate in a variety of ways, perhaps most notably, by commissioning the landmark 1979 report *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*.[21] This influential report, authored by Special Rapporteur Francesco Capotorti, "constitute[s] the most comprehensive and significant analysis to date of the international, regional and national implementation of language rights."[22]

The Special Rapporteur's report included a comprehensive analysis of the use of minority languages in "official matters" in nations all over the world.[23] Concerned about the inability of linguistic minorities to communicate with and receive information from their governments in their own languages, Capotorti praised the efforts of over two dozen nations in Europe, Asia and the Americas that had taken steps to accommodate the use of minority languages in written laws, in the civil and criminal courts, and in oral and written communications with executive and administrative authorities.[24] Accordingly, the report concluded that:

> in all cases where a minority language does not have official status, adequate facilities should be made available to members of the minority linguistic group to ensure that they are not at a disadvantage merely because they speak a different language from the majority. In judicial proceedings and relations with the authorities, for example, provision should be made for a system of translation at the expense of the State.[25]

*A fortiori*, the report would have been highly critical of Arizona's Article XXVIII, which, with a few limited exceptions, not only fails to provide—but purposefully *prohibits*—accommodations for Arizonans who do not understand English.

### 3. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (the "ICCPR"), a treaty ratified by the United States in 1992,[26] was the first international instrument expressly to protect the affirmative rights of linguistic minorities. Although the substantive provisions of the ICCPR are not self-executing, *i.e.*, they do not create private causes of action in domestic courts,[27] the United States has formally stated that its courts may seek guidance from the ICCPR in interpreting American law.[28] Furthermore, upon ratification, the United States declared that it was in full compliance with, among other things, the provisions of the ICCPR governing language rights[29]—thereby implicitly obligating itself to *remain* in compliance.

Like the Universal Declaration of Human Rights, the ICCPR prohibits discrimination on any ground, including language, with

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[21] Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979).

[22] Gromacki, *supra* note 3, at 541-42.

[23] *See* Capotorti, *supra* note 21, ¶¶ 439-479. The report included a similar analysis with respect to the use of minority languages in primary and secondary public schools. *See id.* ¶¶ 498-519.

[24] *Id.* ¶¶ 439-479; *see also* Skutnabb-Kangas, *supra* note 4, at 28-29 (describing laws accommodating the use of minority languages in government affairs and public schools in Sweden, India, South Africa, Spain, and the former Yugoslavia).

[25] Capotorti, *supra* note 21, ¶ 603.

[26] The International Covenant on Civil and Political Rights, *adopted by the General Assembly* Dec. 16, 1966, 999 U.N.T.S. 171.

[27] Senate Comm. on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Doc. No. 23, 102d Cong., 2d Sess. 19, 23 (1992).

[28] *Report of the Human Rights Committee*, U.N. GAOR, 50th Sess., Supp. No. 40, at 54, U.N. Doc. A/50/40 (1995).

[29] *See* Human Rights Watch & American Civil Liberties Union, *Human Rights Violations in the United States: A Report on U.S. Compliance with The International Covenant on Civil and Political Rights* 2 (1993).

respect to the rights secured in the instrument itself.[30] But the ICCPR goes one step further. Article 26, the treaty's equal protection clause, prohibits discrimination on any ground, such as language, in the application of *all* rights—not simply those guaranteed by the Covenant.[31] Indeed, the principle of non-discrimination is so central to the ICCPR, that Article 4(1), which permits the States Parties to derogate their Covenant obligations "[i]n time of public emergency which threatens the life of the nation," forbids any derogation that involves discrimination based on race, colour, sex, language, religion or social origin.

In addition, the ICCPR contains several provisions that expressly or implicitly guarantee the right to use one's own language. One of the most important is Article 19, which guarantees the right to freedom of expression. In a 1993 opinion interpreting Article 19, the Human Rights Committee—the judicial body established under Part IV of the ICCPR to consider reports from and hear complaints against the States Parties—made clear that claims challenging restrictions on the right to use minority languages fall within the ambit of this important provision. The Committee ruled that a Quebec law requiring commercial signs to be written in French, a language not normally employed by the petitioners and their clients, violated the petitioners' Article 19 right to freedom of expression.[32] Although the Committee's holding was confined to expression in the private sector, the opinion made clear that choice of language constitutes an expressive act for Article 19 purposes.

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[30] *See* ICCPR, *supra* note 26, art. 2(1).

[31] The full text of Article 26 provides:

> All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[32] *Ballantyne, Davidson & McIntyre* v. *Canada*, CCPR/C/47/D/359/1989 & 385/1989/Rev.1 (Mar. 31, 1993).



The mandate of Article XXVIII of the Arizona Constitution that government functions and actions be conducted exclusively in a language in which many members of the community normally do not, and perhaps cannot, express themselves, thus seems wholly inconsistent with Article 19's guarantee of the right to freedom of expression. As defined by paragraph 2 of Article 19, the freedom of expression includes the "freedom to seek, receive and impart information." By prohibiting even a willing government employee from responding to an individual in the only language the latter comprehends, Article XXVIII would impair the ability of *both* parties to seek, receive and impart information. Importantly, members of Arizona's dominant language group would experience no corresponding impairment of the right to freedom of expression, thus rendering Article XXVIII inconsistent with the ICCPR's nondiscrimination provisions, which require that Covenant rights be secured without distinction as to language.[33]

Equally central to the ICCPR's language rights regime is the ground-breaking Article 27, which provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

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[33] Although the States Parties may derogate their Article 19 obligations when "necessary, (1) for respect of the rights or reputations of others, (2) for the protection of national security or of public order, . . . or of public health or morals," petitioners make no claim—nor could they—that such circumstances are present here. *See* Abid Hussain, *Report of the Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. E/CN.4/1995/32, ¶¶ 38-55 (1994) (the derogation clause in Article 19 is to be interpreted narrowly). Indeed, Article XXVIII would *imperil* rather than protect some of Article 19's justifications for derogation. For example, as we argue below, *see infra* pt. II.B, measures that repress minority languages—far from preserving public order—generally exacerbate the conditions that lead to disorder.

Interpreted broadly, Article 27 obligates the States Parties to take affirmative steps to ensure that language remains a source of *value* to linguistic minorities. This was the interpretation favored by Special Rapporteur Capotorti when, with Article 27 in mind, he urged the international community to make accommodations for linguistic minorities to communicate with their governments in their own languages.[34] Article XXVIII, of course, would foreclose any such accommodations.

But even under a narrow interpretation, Article 27 is demeaned by Arizona's Article XXVIII. Interpreted narrowly, *i.e.*, in a manner that imposes no affirmative obligations on the States Parties, Article 27 would condemn any law or policy that renders participation in a minority language community less valuable. By prohibiting linguistic minorities from using their own languages in interactions with multilingual State employees, Article XXVIII surely reduces the value of those languages to the groups that speak them.

Moreover, when read in conjunction with the ICCPR's equal protection and nondiscrimination provisions (as every provision in the ICCPR must be), Article 27 prohibits a state from permitting one group to use its language while, in identical circumstances, forbidding another to do so. Article XXVIII, which impedes linguistic minorities—but *not* members of the dominant language group—from conversing with State employees

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[34] *See* Capotorti, *supra* note 21, ch. V, § 9 (discussing the implementation of the principles set forth in Article 27). This "activist" approach is consistent with Capotorti's general understanding of the States Parties' obligations under Article 27:

> In order to give effect to the rights set forth in article 27 of the Covenant, active and sustained measures are required from [the] States. A purely passive attitude on their part would render those rights ineffective.

*Id.* ¶ 588; *see* Louis B. Sohn & Thomas Buergenthal, *International Protection of Human Rights* 319-23 (1973) (discussing Capotorti's interpretation of Article 27).



in their own language, is thus contrary to the principle of nondiscrimination that is at the heart of the ICCPR.

In addition to Articles 19 and 27, the ICCPR contains several provisions from which the right to use one's language may be inferred. Article 25, for example, provides that "[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2[35] and without unreasonable restrictions:" to vote, to take part in the conduct of public affairs, and to have access to public service. Other provisions of the ICCPR guarantee the right to an effective remedy,[36] and the right "to recognition everywhere as a person before the law."[37] These rights, all intimately linked to the ability to use in official as well as private communications a language with which one has familiarity and proficiency, are no less diminished by Article XXVIII than are the ICCPR's *express* language rights provisions.

### 4. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

On December 18, 1992, the U.N. General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[38] Thirty-six nations sponsored the resolution urging passage of the Declaration, including the United States. Adopted by

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[35] Article 2 requires the States Parties to respect all of the rights set forth in the ICCPR without distinction as to, among other things, language. *See supra* note 30 and accompanying text.

[36] ICCPR, *supra* note 26, art. 3(a).

[37] *Id.* art. 16.

[38] The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., 3d Comm., Annex, U.N. Doc. A/47/678/Add.2 (1992).

consensus—"a fact which contributes greatly to [its] force"[39]—the Declaration represents the most sweeping statement by the U.N. to date regarding the protection of linguistic minorities and language rights.

Inspired by Article 27 of the ICCPR, the Declaration places numerous obligations upon the Member States with respect to linguistic human rights. Under the Declaration, Member States are required, among other things, to: "protect the existence and the . . . linguistic identity of minorities within their respective territories and . . . encourage conditions for the promotion of that identity"; ensure that linguistic minorities "have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue"; "create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their . . . language"; plan and implement "[n]ational policies and programmes . . . with due regard for the legitimate interests of persons belonging to [linguistic] minorities"; and take measures "to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law." The Declaration further provides that persons belonging to linguistic minorities have "the right to participate effectively in . . . public life" and "the right . . . to use their own language, in private and in public, freely and without interference or any form of discrimination."[40]

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Through its membership in the United Nations, its adherence to treaties, and its leadership in the international human rights community, the United States has actively condemned human rights violations wherever and whenever they occur. It would be both ironic and regrettable if a domestic law such as

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[39] Patrick Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations," *in The UN Minority Rights Declaration* 11, 26 (Alan Phillips & Allan Rosas eds., 1993).

[40] *See supra* note 38.



Article XXVIII of the Arizona Constitution, which is clearly inconsistent with this nation's international obligations, were permitted to stand. As one writer has observed:

> [T]he expansion of internationally recognized collective rights could lead to conflict with American domestic policies. The United States cannot, without a fatal measure of hypocrisy, demand that foreign governments grant minority languages equal status and simultaneously insist on the dominant role of English within its own borders.[41]

## II. ARTICLE XXVIII WOULD UNDERMINE RATHER THAN PROMOTE THE STATE INTERESTS IDENTIFIED BY THE PETITIONERS

### A. Restrictions on the Use of Minority Languages Figure Prominently in the Policies of Repressive Governments

There is no merit to petitioners' claim that Article XXVIII, by restricting the use of languages other than English, will promote Arizona's interest in affirming its legitimacy. "Any forms of restriction, particularly those that affect people as intimately as languages, run counter to natural democratic tendencies."[42] Rather than reflecting a constructive attempt to build national unity, laws restricting the use of minority languages often represent one facet of a larger effort to marginalize, persecute or forcibly assimilate disfavored ethnic and cultural minorities.[43]

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[41] Robert Cullen, *Human Rights Quandary*, Foreign Aff., Winter 1992/93, at 79, 85.

[42] Erika Dailey, *Report on the Status of Non-Russian Languages in the USSR*, 1 Report on the USSR, No. 30, July 28, 1989, at 26, 28.

[43] *See* 2 Ostrower, *supra* note 8, at 667 (in the "processes of absorption and assimilation the first to be victimized [have been] the languages of minorities"); Phillipson, *supra* note 1, at 2 (observing that the suppression (continued...)

The "[s]uffocation of language has always been part of policies of domination."[44] It is not surprising then that policies restricting the use of minority languages have been employed with terrifying consistency by totalitarian governments. Thus, by attempting to eliminate the use of minority languages from the public sector, Arizona places itself—and, by extension, the United States—in the embarrassing company of some of the world's most repressive regimes.

### 1. The Former Soviet Union

In an attempt to suppress separatist movements and create one unified socialist culture,[45] the Soviet Union duplicated the Tsarist policy of "russifying" the cultures of the numerous ethnic minorities living within the empire.[46] As part of this assimilation effort, the Communist Party restricted the use of minority languages while requiring the use of Russian for all official communications.[47] Russian was declared the official form of expression in the Soviet Union and its use was mandated in public schools and government activities throughout the republics.[48]

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[43](...continued)
of certain individuals and groups is often carried out through language repression); Skutnabb-Kangas, *supra* note 4, at 11-14 (noting that ethnic, cultural and *linguistic* repression has replaced racism as the primary means of suppressing disfavored groups).

[44] Lador-Lederer, *supra* note 17, at 25.

[45] *See* Richard E. Weiner, *70 Languages Equal and Free?: The Legal Status of Minority Languages in the Soviet Union*, 6 Ariz. J. Int'l & Comp. L. 73, 78-79 (1989); 2 Ostrower, *supra* note 8, at 612-13.

[46] Uriel Weinreich, *The Russification of Soviet Minority Languages*, 2 Probs. of Communism, No. 6, 1953, at 46, 47.

[47] Weiner, *supra* note 45, at 78.

[48] *Id.*; 2 Ostrower, *supra* note 8, at 615; 1 *id.* at 476.



Despite internal resistance to Soviet linguistic repression,[49] the Party's efforts were largely successful. By the 1980's, Russian had largely taken the place of other languages in government administration, scholarly publications, secondary schools and universities throughout the Soviet Union.[50]

As the Soviet Union began to embrace reforms in the late 1980's, Moscow gradually relaxed prohibitions on the use of minority languages.[51] As one editorial in a Soviet newspaper commented in 1989, "'when we are putting stress on the broadening of rights and freedoms of every person and every people, enforced [use] of any language whatsoever throws us backward in the movement towards a democratic society.'"[52]

### 2. Franco's Spain

After solidifying his power in 1939, Franco forced Spain's Basque, Catalan and Galician minorities to comply with extremely repressive cultural and linguistic policies. In his effort to achieve national unity "by the use of force, repressive legal measures and adherence to a social philosophy of forced assimilationism,"[53] Franco declared Spanish the "language of the empire"[54] and prohibited the use of minority languages in any official or public capacity.[55] The regime proscribed the use of

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[49] *See* 2 Ostrower, *supra* note 8, at 620.

[50] Weiner, *supra* note 45, at 81, 84-85.

[51] *See* Dailey, *supra* note 42, at 27.

[52] *Id.* at 28 (quoting Pravda Vostoka, June 23, 1989, at 3).

[53] Juan Cobarrubias, "The Protection of Linguistic Minorities in the Autonomous Communities of Spain," *in Language and Law: Proceedings of the First Conference of the International Institute of Comparative Linguistic Law* 399, 409 (Paul Pupier & José Woehrling eds., 1988).

[54] Stanley G. Payne, *The Franco Regime 1936-1945* 231 (1987).

[55] Manuel Medina, "Spain: Regional, Linguistic and Ideological Conflict," *in* 1 *Case Studies on Human Rights and Fundamental Freedoms: A World Survey* 133, 140 (Willem A. Veenhoven ed., 1975); *see* Payne, (continued...)

the Catalan and Basque languages in the courts,[56] banned the Basque language from schools and public gatherings,[57] and declared all expression in the Catalan language outside the home a crime.[58] In addition, all Galician, Catalan and Basque language publications were abolished.[59]

### 3. Communist Romania

Prior to the Romanian Revolution of 1989, ethnic minorities in Romania were persecuted by the Communist regime's highly repressive policy of forced assimilation. The regime targeted ethnic Hungarians in particular due to their large numbers and strong ties to neighboring Hungary. As part of its campaign to "Romanianize" the two million ethnic Hungarians living in Romania, the Romanian government placed severe restrictions on the use of the Hungarian language in the media, universities, and religious and cultural institutions.[60] By the late 1980's, no language other than Romanian was tolerated in official and administrative functions and in public life generally.[61]

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[55](...continued)
*supra* note 54, at 231.

[56] Payne, *supra* note 54, at 231.

[57] Robert Clark, *The Basques: The Franco Years and Beyond* 137 (1979).

[58] David H. Rosenthal, *Thriving Without a State: After Years of Repression Catalans Have Revived their Language and Economy and are Winning Significant Autonomy From Spain*, The Atlantic, June 1989, at 20, 23; Medina, *supra* note 55, at 140.

[59] Jose Yglesias, *The Franco Years* 252 (1977); Payne, *supra* note 54, at 231.

[60] Helsinki Watch, *Since the Revolution: Human Rights in Romania* 15 (1991); Commission on Security and Cooperation in Europe, *Minority Rights: Problems, Parameters, and Patterns in the CSCE Context* 148-50 (1991) [hereinafter *Minority Rights*].

[61] Helsinki Watch, *Destroying Ethnic Identity: The Hungarians of Romania* 19-21 (1989).



### 4. Communist Bulgaria

Beginning in the early 1970's, the Bulgarian Communist regime harshly repressed ethnic Turks,[62] for example, by banning the teaching of classes in any language other than Bulgarian.[63] In late 1984, Bulgaria "embarked on a full-scale campaign to forcibly assimilate its estimated 1 million member Turkish minority."[64] Linguistic repression played a major role in this assault on Turkish identity. Fines were levied against individuals found speaking Turkish in public or possessing Turkish language publications.[65] Letters within Bulgaria, if written in Turkish, often did not reach their destinations.[66]

### 5. Nazi Germany

Although more extreme in its overall policy of ethnic repression and cultural annihilation, the dictatorship of Nazi Germany also persecuted people of disfavored ethnicities by prohibiting the use of their native languages. For example, as part of the Nazi plan to "render[] Poland harmless," members of Poland's "higher social strata were to be taken to concentration camps . . . [where] they would not be allowed to speak Polish."[67] In 1939, Adolf Hitler "spoke frankly and brutally of linguistic extermination . . . when he stated: 'I keep my "Skull and Crossbones" formations ready to kill, without mercy or pity, men, women and children of Polish origin and

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[62] *Minority Rights*, *supra* note 60, at 162.

[63] *Id.*; Helsinki Watch, *Destroying Ethnic Identity: The Expulsion of the Bulgarian Turks* 3 (1989).

[64] *Minority Rights*, *supra* note 60, at 162.

[65] *Id.* at 163; Helsinki Watch, *Destroying Ethnic Identity: The Turks of Bulgaria* 13 (1986).

[66] *Minority Rights*, *supra* note 60, at 163.

[67] 2 Ostrower, *supra* note 8, at 666 n.3 (citing Lord Russell of Liverpool, *The Record: The Trial of Adolf Eichmann for His Crimes Against the Jewish People and Against Humanity* 329-30 (1963)).

*who speak Polish.*'"[68] Also, as part of their campaign to purify the German language, the Nazis rejected the use of words that derived from foreign languages, often inventing new words to replace them.[69]

### B. Restrictive Language Policies Inspire Resistance and Ignite Conflict

Equally meritless is petitioners' argument that Article XXVIII will promote Arizona's purported interest in "encouraging unity." The overwhelming evidence demonstrates that, far from promoting unity, policies curtailing the use of minority languages amplify the conditions that lead to disunity. This occurs, first, because such policies invariably inspire resistance or, as one study has stated, "a contrary reaction in favour of [minority] languages."[70] Second, absolute insistence on the use of an official language inevitably causes certain members of linguistic minority groups "to withdraw in some measure from the national life"[71]—a result hardly consistent with unity. Third, and far worse, attempts to banish minority languages from public life almost always ignite conflict, often violent, between linguistic minorities and speakers of the dominant language, and between different groups of linguistic minorities.

The potential for conflict that is created by restrictive language policies should not be underestimated:

[68] *Id.* at 666 (emphasis in original) (citing *We Have Not Forgotten* 8 (The League of Fighters for Freedom and Democracy ed., 1959)).

[69] 1 *The Encyclopedia of the Third Reich* 284 (Christian Zentner & Friedemann Bedürftig eds. & Amy Hackett ed. Eng. trans., 1991); Richard Grunberger, *The 12-Year Reich: A Social History of Nazi Germany 1933-1945* 329 (1971).

[70] Eugene A. Nida & William L. Wonderly, "Communication Roles of Languages in Multilingual Societies," *in Language Use and Social Change* 57, 63 (W.H. Whiteley ed., 1971).

[71] The Report of the UNESCO Meeting of Specialists, 1951, *reprinted in The Use of Vernacular Languages in Education* 45, 50 (1978).



> Language is for most ethnic groups one of the most important cultural core values. A threat to an ethnic group's language is thus a threat to the cultural and linguistic survival of the group. Lack of linguistic rights often prevents a group from achieving educational, economic and political equality with other groups. Injustice caused by *failure to respect linguistic human rights* is thus in several ways one of the important factors which can contribute to inter-ethnic conflict—and often does.[72]

In general, language-related conflicts arise not because linguistic minorities are different from speakers of the dominant language, but rather because "'*they are no longer allowed to be different.*'"[73] In other words, it is the denial—not the provision—of language rights that is at the root of the world's most severe language-related conflicts. The following examples illustrate the point:

- In 1977, the government of Quebec (headed by the separatist Parti Quebecois) enacted the Charter of the French Language, mandating the exclusive use of French in virtually all spheres of public and private life, and limiting access to English-language schools. The Charter's wide-ranging provisions have had a profoundly negative impact on Quebec's linguistic minorities, particularly the English-speaking minority, which now accounts for approximately ten percent of the province's overall population. At least 200,000 English speakers have emigrated from Quebec since the restrictive language laws were adopted. According to a 1988 survey, over three-quarters of expatriate Montrealers stated that the language laws influenced their decision to leave.[74] In addition, numerous Canadian businesses—including some of Quebec's largest companies—have chosen to move their headquarters out of the province rather

[72] Phillipson, *supra* note 1, at 7 (emphasis in original).

[73] *Id.* (emphasis in original) (quoting Björn Hettne, *Etniska konflikter och internationella relationer* 66-67 (1987)).

[74] Sarah Scott, *The Picture of Health*, The Gazette (Montreal), May 2, 1996, at A8.

than submit to the Charter's severe restrictions on the use of English in the workplace.[75]

In 1988, the Canadian Supreme Court declared several provisions of the Charter unconstitutional on the grounds that their outright prohibition of the use of a language other than French infringed upon the right to freedom of expression and the guarantee against discrimination based on language.[76] In 1993, the Quebec government revised certain aspects of the Charter to allow for greater use of languages other than French. However, the recent election of a Parti Quebecois government intent on reviving the Charter's more extreme provisions has fostered renewed fears of a linguistic crackdown among the province's English speakers.[77] According to a study conducted by a Montreal psychologist after the province's October 1996 referendum on separation, the renewed linguistic and political tensions have led to "flare-ups of chronic illnesses, sleep problems, forgetfulness, angry spells, increased alcohol use, feelings of despair and 'survivor guilt.'"[78] In addition, a recent survey of English-speaking youths in Quebec indicated that over seventy-five percent intend to leave the province because of language concerns.[79]

- In the early days of Pakistan's existence, the mere suggestion that the nation establish an official language proved a serious threat to federal unity. The recommendation of the Basic Principles Committee in its Interim Report to the Constituent Assembly that the nation adopt Urdu as its official language touched off such a storm of protest that the Committee omitted

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[75] Anne Swardson, *O, Montreal, City of Exodus*, Wash. Post, Mar. 21, 1996, at A25; Scott, *supra* note 74, at A8.

[76] *Attorney-General of Quebec* v. *La Chaussure Brown's Inc.*, 54 D.L.R. 4th 577 (Can. 1988).

[77] Scott, *supra note* 74, at A8; *see also* Elizabeth Thompson, *Anglos Warned of Backlash; Protests Might Bring Tougher Language Laws: Landry*, The Gazette (Montreal), Apr. 26, 1996, at A1.

[78] Swardson, *supra* note 75, at A25.

[79] Scott, *supra* note 74, at A8.



any reference to an official language in its next Report. To further ease the smoldering tensions, the Committee later recommended the recognition of two official languages, Urdu and Bengali. However, even this recommendation proved divisive, causing the drafters of the 1956 Constitution to dispense with the establishment of an official language and adopt both Urdu and Bengali as "State languages"—a decision which helped allay Bengali anxieties and reduce internal tensions between the two groups.[80]

- The 1956 report of India's first Official Language Commission recommending that Hindi replace English as the official language for federal affairs produced widespread popular demonstrations and the destruction of Hindi signs in the Dravidian-speaking southern region. The dissension caused the Congress Party to embrace a compromise during its 1958 annual session, which contemplated the establishment of both Hindi and English as official languages by 1965—a formula eventually adopted by the Indian Parliament.[81]

- In January 1989, the Supreme Soviet of Lithuania, under pressure from the growing nationalist movement in that republic, passed a controversial law making Lithuanian the republic's official language. Shortly thereafter, several rural district soviets in regions heavily populated by ethnic Poles passed resolutions proclaiming themselves autonomous and not bound by the new language law. On October 2, 1990, several months after Lithuania declared its independence from the Soviet Union, Lithuanian officials announced that implementation of the 1989 language law would be delayed. Unimpressed by the softening of the government's position, a congress of Polish deputies, on October 6, proclaimed the formation of a Polish National Territorial District encompassing five southeastern regions of Lithuania. In response, the Lithuanian Parliament, on November 25, 1990, formally delayed implementation of the

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[80] Ronald L. Watts, *Multicultural Societies and Federalism*, 8 Studies of the Royal Comm'n on Bilingualism & Multiculturalism 1, 80-81 (1970).

[81] *Id.* at 81-82.

language law until January 1995 in regions where non-Lithuanian speakers comprised the majority. In January 1991, Lithuania's Supreme Council made additional concessions, in the form of amendments to the 1989 law on ethnic minorities, which permitted equal use of minority languages in local administration and guaranteed to linguistic minorities the right to education in their native languages from pre-school through secondary school.[82]

- The vote on an October 1990 bill making Slovak the official language of Slovakia, thus prohibiting the republic's 600,000 ethnic Hungarians from using their own language in official dealings, caused thousands of protestors and counter-protestors to besiege the Slovak Parliament.[83] Fierce opposition to the bill forced the coalition government to add a provision guaranteeing linguistic minorities the right to communicate with authorities in their own languages in regions where they constituted at least twenty percent of the population.[84] In spite of the "compromise," implementation of the law produced widespread protest. In the summer of 1993, when local officials in southern Slovakia began replacing bilingual road signs with Slovak-only signs, the head of the village of Marclova, in which ethnic Hungarians constitute a majority, ordered a road blockade in retaliation. Slovakia's Hungarian leaders claimed that the removal of the bilingual signs was an act of manifest discrimination, and vowed to take their claims to the Council of Europe and other international bodies.[85]

In November 1995, the newly independent nation of Slovakia passed a law banning the use of all languages other than Slovak

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[82] *Minority Rights*, *supra* note 60, at 100-04.

[83] Henry Kamm, *Language Bill Weighed as Slovak Separatists Rally*, N.Y. Times, Oct. 25, 1990, at A15; *Slovak Now Official Language*, N.Y. Times, Oct. 26, 1990, at A6.

[84] *Slovak Now Official Language*, *supra* note 83, at A6; *see also* Kitty McKinsey, *Purifying Language: This Time, it's Slovakia*, The Gazette (Montreal), Mar. 3, 1996, at B1.

[85] *Bilingual Signs Dispute*, The Warsaw Voice, Aug. 22, 1993, *available in* LEXIS, Europe Library, WRSAWV File.



in state matters, courts and other legal proceedings, the armed forces, elementary and secondary schools, and virtually banning or mandating the subordination of other languages in other public spheres, such as the mass media, cultural events, public meetings, and public information regarding health and consumer information.[86] The new law drew protests not only from the nation's numerous ethnic Hungarians, who regarded it as a repressive attempt to assimilate them,[87] but from the international community as well. The day after the law was passed, the European Parliament passed a motion asking the Slovak government to "respect democratic principles."[88] The law also caused the United States to voice concerns about the state of democracy generally in the newly formed Slovakian state.[89]

- In Kosova, where ethnic Albanians constitute ninety percent of the population, a 1990 dictate from the ruling Serbian authorities making Serbian the exclusive language of that state inspired the Albanian leadership to organize an underground society—prompting one journalist to note that if war breaks out in that region, "the enforcement of an official language policy will be one of the main causes."[90]

- In 1989, a campaign by the legislature of Soviet Georgia to intensify the use of the Georgian language throughout the republic severely exacerbated tensions between Georgians and ethnic Ossetians, who, since 1922, occupied a region within Georgia known as the South Ossetian Autonomous Oblast, and

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[86] *See* Law of the National Council of the Slovak Republic, of 15th November 1995, on the State Language of the Slovak Republic, *reprinted in* Hospodarske noviny, Dec. 12, 1995, *translated in* CTK news agency, Prague, in English 2203 gmt, Dec. 13, 1995; McKinsey, *supra* note 84, at B1; *Slovak-Only Law Passed*, The Edmonton Journal, Nov. 17, 1995, at B4.

[87] McKinsey, supra note 84, at B1.

[88] Gwynne Dyer, *Language Fight Could Start War in Slovakia*, The Calgary Herald, Dec. 16, 1995, at A15.

[89] McKinsey, supra note 84, at B1.

[90] Aryeh Neier, *Watching Rights*, The Nation, Feb. 14, 1994, at 187.

make up roughly three percent of Georgia's total population. As a direct result of the perceived repression of their language, the Georgian Ossetians moved to make Ossetian the state language of the Oblast, and sought permission from Moscow to break with Georgia and join the autonomous republic of North Ossetia.[91]

- In Northern Ireland, the inability of Irish-speakers to communicate with their government in their own language contributed to the institution of the "O'Fiach Principles" on June 9, 1990, an initiative by Irish-speakers to establish a language rights charter.[92]

- French laws requiring ethnic Britons, Alsacians, Occitans, Savoyards, Corsicans and Basques to send their children to French-only schools has led to the virtual disappearance of those languages from France.[93] The repression of those languages, however, has not come without a price. Promotion of the Corsican language, for example, now figures prominently among the demands made upon the French government by the violent Corsican separatist movement.[94]

- In Sri Lanka, the 1956 passage of the Official Language Act designating Sinhala as the official language for government administration and education was intensely opposed by Sri Lanka's Tamil-speaking minorities, who constitute roughly twenty-five percent of the population. In 1956 and 1958, The Tamil Federal Party organized peaceful demonstrations in opposition to the law, which it regarded as discriminatory. In retaliation, Sinhalese partisans engaged in widespread rioting,

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[91] *Minority Rights*, *supra* note 60, at 66-67.

[92] Feilim O hAdmaill, *A Language Rights Charter for Irish Speakers*, Just News (Belfast), June 1990, at 5; *Update*, Just News (Belfast), July 1990, at 3.

[93] Matthew Fraser, *Manipulating Nationalism: The Parallels in France and Quebec*, The Gazette (Montreal), Aug. 7, 1994, at B1.

[94] Editorial, *The Corsican Debacle*, The Asian Wall Street Journal, June 3, 1996, at 8.



resulting in the deaths of hundreds of Tamils and making refugees out of thousands more. During this time, the Federal Party's demand for Tamil autonomy—first, under a federalist constitution, and later, as an independent nation—gained widespread support among the Tamil electorate.[95] The "Sinhala only" language policy was responsible, in significant part, for the civil war that erupted in Sri Lanka in the mid-1980's, which has since claimed 30,000 to 40,000 lives.[96]

* * * *

Although the citations can be multiplied, the above examples suffice to demonstrate that restrictive language policies tend to aggravate rather than alleviate conflict and discord. In recognition of that fact, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities proclaims that

> the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live.[97]

As the international human rights community has universally concluded, the solution to language-related problems is to protect—rather than impair—language rights.

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[95] Human Rights Watch, *Playing the "Communal Card": Communal Violence and Human Rights* 80-84 (1995).

[96] Neier, *supra* note 90, at 187.

[97] *See supra* note 38.

## CONCLUSION

For the reasons set forth above, Human Rights Watch suggests that the decision below should be affirmed.

Dated: New York, New York
July 12, 1996

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

*Petitioners,*

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

*Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

## BRIEF OF AMICI CURIAE LINGUISTIC SOCIETY OF AMERICA AND NATIONAL COUNCIL FOR LANGUAGES AND INTERNATIONAL STUDIES IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICI CURIAE

Amicus Linguistic Society of America ("LSA") is a scholarly organization, founded in 1924, whose membership consists of thousands of academic and professional linguists in the United States.[1] The object of the LSA, as expressed in its constitution, is the advancement of the scientific study of language. It is the premier organization in this country devoted to that goal. This is the only time that the LSA has filed an amicus brief before this Court.

Since the LSA's inception, many of its members have devoted their professional lives to recording, analyzing and preserving the severely threatened native languages of this continent. Arizona is especially rich in the number and diversity of indigenous languages still spoken there, including Apache, Havasupai, Hopi, Hualapai, Navajo, O'odham (Papago) and Yaqui; Navajo has the largest number of speakers of any indigenous language in the United States.[2] Arizona's law will not only have practical implications in the dealings of native peoples with the State, but sends a symbolic message undermining their efforts to preserve their languages and cultures.

From an early emphasis on indigenous languages, American linguistics has expanded its horizons by describing hundreds of other languages around the world, including sign languages of the deaf. These

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[1] Linguists who assisted with the preparation of, or commented on, this brief include Emmon Bach, Geoffrey Nunberg, Janine Scancarelli, and Elizabeth Traugott.

[2] *See generally* Bureau of the Census, Dep't of Commerce, 1990 Census of Population: Characteristics of American Indians by Tribe and Language, section 2 of 2 (1990). The census reports that Arizona has 76,954 speakers of Navajo. *Id.* at 862.

descriptive studies have further advanced our knowledge of phonetics and phonology, syntax and semantics. Perhaps more relevant to the case at bar, linguists and other language experts have learned a great deal regarding how children learn language, and how adults learn second languages. In addition, linguists have studied the many ways in which languages interact with each other, including the dynamics of bilingual and multilingual societies, the relationship of dialects to standard language, and the choices that speakers make regarding which dialect or language to speak in which situation. Perhaps most directly on point, linguists have studied how languages interact in the many speech communities within the United States.

Amicus National Council for Languages and International Studies ("NCLIS") is an umbrella organization consisting of many professional societies involved in the teaching of language.[3] Members of the NCLIS have

[3] Members include Advocates for Language Learning, American Assembly of Collegiate Schools of Business, American Association of Teachers of French, American Association of Teachers of German, American Association of Teachers of Slavic and East European Languages, American Association of Teachers of Spanish and Portuguese, American Council of Teachers of Russian, American Council on the Teaching of Foreign Languages, The American Forum for Global Education, Association of Teachers of Japanese, California Foreign Language Teachers Association, Center for Applied Linguistics, Center for Intensive Language and Culture, Central States Conference on the Teaching of Foreign Languages, Chinese Language Teachers Association, Colorado Congress of Foreign Language Teachers, Connecticut Council of Language Teachers, Florida Foreign Language Association, Foreign Language Association of Georgia, Foreign Language Association of Missouri, Foreign Language Association of



substantial knowledge about, and experience with, second language acquisition. Its members are particularly concerned by the symbolic implications of this case. Americans generally have a very poor record in learning other languages, despite the obvious advantages of doing so in an increasingly global economy. Unfortunately, "English-only" laws dampen enthusiasm for learning

North Carolina, Foreign Language Association of Virginia, Georgetown University Roundtable on Languages and Linguistics, Greater Washington Association of Foreign Language Teachers, Indiana Foreign Language Teachers Association, Illinois Council on the Teaching of Foreign Languages, International Association of Learning Laboratories, Kansas Foreign Language Association, Linguistic Society of America, Massachusetts Foreign Language Association, Michigan Foreign Language Association, Minnesota Council on the Teaching of Foreign Languages, Modern Language Association-Association of Departments of Foreign Languages, Modern Language Journal-National Federation of Modern Language, Teachers Associations, National Association for Bilingual Education, National Association of District Supervisors of Foreign Languages, National Association of Self-Instructional Language Programs, National Committee for Latin and Greek, National Council of State Supervisors of Foreign Languages, National Network for Early Language Learning, New York State Association of Foreign Language Teachers, Northeast Conference on the Teaching of Foreign Languages, Northern New England State Foreign Language Associations, Ohio Foreign Language Association, Pacific Northwest Council for Languages, Pennsylvania State Modern Language Association, Satellite Education Resources Consortium, South Atlantic Modern Language Association, Southern Conference on Language Teaching, Southwest Conference on Language Teaching, Teachers of English to Speakers of Other Languages, Tennessee Foreign Language Consortium, Texas Foreign Language Association, Washington Association for Language Teaching, and Wisconsin Association of Foreign Language Teachers.

other languages. Even worse, they may encourage Americans who already speak other languages to become monolingual speakers of English, thus depriving American businesses and organizations of a valuable linguistic resource.

In this brief, amici will apply their expertise to the question of whether Arizona's strict official English law is consistent with the United States Constitution. Specifically, the brief will focus on the justifications that have been given for the law.

Letters of consent to the filing of this brief, received from all parties, have been filed with the Clerk of this Court.

## SUMMARY OF ARGUMENT

Article 28 of the Arizona Constitution lacks any reasonable justification. It cannot be rationalized on the ground that it promotes democracy or national unity. Rather than enhancing citizen participation in government, Article 28 reduces opportunities for Arizonans to interact with the State. Furthermore, limiting access to government violates American ideals of linguistic toleration, which can be traced to the founding of this nation, and which have never endangered national unity. Examples of social conflict that are popularly ascribed to linguistic differences, such as those in Canada, Belgium, or Sri Lanka, in fact demonstrate that it is not the presence of diverse languages within a nation, but rather the repression of one language by speakers of another that engenders hostility and possible disunity.

Moreover, Article 28 will not further the State's asserted interest in promoting a common language. Immigrants are learning English in much the same way and at



the same rate as they did in the past. What determines how quickly immigrants learn English is the age at which they arrive in this country, the length of time that they have been here, the quality of the State's educational system, and other factors over which Article 28 exerts no control.

Additionally, Article 28 will not protect public confidence or prevent disillusionment. Of course, there is a somewhat larger number of speakers of languages other than English in the United States than in preceding decades. Yet recent immigrants are learning English as quickly as their predecessors. Any remaining public concerns are in reality directed at the volume of recent immigration, a matter of exclusively Federal concern, or are simply xenophobic. Finally, the purported justification that Article 28 will promote efficiency is – as the State concedes – simply wrong.

None of the posited justifications for Article 28 can outweigh the substantial burdens that it places on Arizonans who seek to petition or interact with the State but speak little or no English. In fact, depriving non-English-speaking Arizonans of the opportunity to interact directly with government employees, as Article 28 does, is not rationally related to any of its purported goals.

## ARGUMENT

Despite appearances, this case is not about whether a state can make English its official language. Rather, the issue is whether a state can legitimately prohibit state actors from using any other language while performing their duties. Ariz. Const. art. XXVIII ("Article 28"). Such a prohibition is especially problematic when it restrains bilingual state actors – such as Ms. Yniguez – who are

willing and able to speak another language, and who can therefore communicate more efficiently and more clearly with certain state residents in that manner. People who travel to other countries are often enormously frustrated by not being able to speak the language. For state employees like Yniguez, it is even more frustrating when they are fully capable of speaking the language of someone who seeks assistance, and could provide the needed assistance much more efficiently in another language, but are forbidden to do so.

Not only does the prohibition muzzle state officials, but it imposes substantial burdens on residents who do not speak English, or who do not speak it very well. While the number of non-English-speaking Americans is relatively small, the prohibition at issue absolutely bars them from engaging in direct communications with the State.

As this Court so aptly observed in *Meyer v. Nebraska*: "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." 262 U.S. 390, 401 (1923). Article 28 of the Arizona Constitution favors those "born with English on the tongue," while imposing substantial burdens on those who have not yet mastered the language. Several justifications have been offered for imposing such burdens. None can withstand analysis.



## I. ARTICLE 28 WILL NOT PROMOTE DEMOCRACY OR ENCOURAGE UNITY AND POLITICAL STABILITY

The most commonly cited justification for laws like Article 28 is that they will promote democracy and protect it from the dangers of linguistic and cultural separatism. Brief for Petitioners at 36-38. In actuality, Article 28 will reduce participation in the democratic process. Furthermore, arguments that Article 28 will foster unity and stability rest on misconceptions regarding the linguistic situation in other countries, and lack of knowledge about our own nation's rich multilingual tradition. While the State has a vital interest in promoting unity and democracy, Article 28 will do nothing to further those goals.

### A. Democracy Is Advanced by the Broadest Possible Participation in Governmental Affairs; Article 28 Reduces Such Participation by Citizens Who Speak Little or No English

A democratic state derives its legitimacy from the consent and participation of its citizens. In President Lincoln's famous words, democracy is government "of the people, by the people, for the people."[4] It is axiomatic that unjustified limitations on citizen participation are fundamentally antidemocratic. On the other hand, a state can promote democracy by encouraging as many of its citizens as possible to vote, discuss issues of public importance, and otherwise become involved in the affairs

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[4] Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in 7 The Collected Works of Abraham Lincoln* 22, 23 (Roy P. Basler ed., 1953).

of government. "[T]o facilitate and enlarge public discussion and participation in the electoral process [are] goals vital to a self-governing people." *Buckley v. Valeo*, 424 U.S. 1, 92-3 (1976).

Far from promoting democratic values, as its defenders maintain, the purpose and effect of Article 28 is to reduce citizen participation in government. Article 28 expressly provides that English is "the language of the ballot, the public schools and all government functions and actions." Art. 28 § (1)(2). It extends its scope not only to the legislative, executive, and judicial functions of the State, but also to "all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities." *Id.* § 1(3)(a)(ii). It encompasses not only statutes and ordinances, but also "programs and policies." *Id.* § 1(3)(a)(iii). And should any doubt as to its scope remain, it expressly applies to "all government officials and employees during the performance of government business." *Id.* § 1(3)(a)(iv).

Consequently, the mayor and city officials of a small rural town in Arizona where some residents still speak Spanish or Navajo or Apache are prohibited from discussing matters of public concern in any language but English. Unless there is a supervening federal mandate, state or local officials may not provide voters with election materials in other languages. Apparently, state legislators may not even address constituents in their own language, unless that language happens to be English. Furthermore, Article 28 prohibits Arizona officials from communicating with the deaf by means of American Sign



Language (which is not a variety of English[5]), unless required by Federal law.

There is absolutely no question that Article 28 will not increase participation in the democratic process. By limiting communication between the government and its citizens, Article 28 can only serve to *reduce* participation in voting and other forms of self-governance.

### B. Linguistic Regulation Is Alien to American Democratic Values

The argument that Article 28 will enhance democratic values flies in the face of long-established American democratic ideals that government should not dictate what is orthodox in matters linguistic. It has always been deemed important for residents of this country to be able to speak English, as this Court recognized in *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). Yet as the Court further observed, this goal "cannot be coerced by methods which conflict with the Constitution." *Id.*

At the time of the Revolutionary War, there was a great deal of linguistic diversity in the United States. Large numbers of Germans lived in Pennsylvania, Maryland, Virginia and New York, as well as Dutch in New York and Delaware.[6] In the midwestern territories east of the Mississippi, most European inhabitants were French.[7]

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[5] *See generally* Ursula Bellugi & Edward Klima, *The Signs of Language* (1979).

[6] Nancy Faires Conklin & Margaret A. Lourie, *A Host of Tongues: Language Communities in the United States* 5 (1983); Heinz Kloss, *The American Bilingual Tradition* 11-12 (1977).

[7] Kloss, *supra*, at 164.

There was also, of course, a wide variety of American Indian languages.[8]

If the use of languages other than English were a threat to democracy, it would have been even more so when our nation was founded. At that time, there was no public school system to ensure that all children are able to speak English. The mobility of the population was limited, leading to large enclaves of speakers of non-English languages. The mainly agricultural economy would have enabled many people to work in isolated environments where English was seldom heard. And mass media, such as radio and television, were yet to be invented. Under these conditions, linguistic communities could and did maintain their native languages to a far greater extent than is possible today.

Yet none of the original thirteen states found it necessary to declare English its official language. Remarkably, this was true even in Pennsylvania, despite Benjamin Franklin's famous fears that Germans were not assimilating linguistically: "Few of their children in the Country learn English; they import many books from Germany; and of the six printing houses in the Province, two are entirely German."[9] Franklin suggested that the Germans in Pennsylvania "will soon so out number us, that . . . we . . . will not . . . be able to preserve our language, and even our Government will become precarious."[10] In a

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[8] *See generally* 10 *Current Trends in Linguistics* (Thomas A. Sebeok ed., 1973).

[9] Letter from Benjamin Franklin to Peter Collinson (May 9, 1753) *in* 4 *The Papers of Benjamin Franklin* 477, 484 (Leonard W. Labaree & Whitfield J. Bell eds., 1961).

[10] *Id.* at 485.



few years, Franklin mused, it might become necessary to use interpreters in the state Assembly, "to tell one half of our Legislators what the other half say."[11] Pennsylvania later enacted measures that would have horrified today's proponents of English-only laws. In the late eighteenth and early nineteenth century, the state published statutes and other official documents in German.[12] Pennsylvania, along with some other states, even allowed the establishment of German-language public schools during this period.[13]

As in the individual states, the founders of our nation felt no need to make English the official language of the Federal government. History has proved them correct. For example, although there were approximately 9 million German speakers on American soil in 1910, the German language in America is now virtually extinct.[14] Notwithstanding the myth that German almost became the official language of the United States,[15] neither German nor any other language has ever threatened the position of English.

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[11] *Id.* at 484.

[12] Heinz Kloss, *The American Bilingual Tradition* 143-44 (1977).

[13] *Id.* at 149-150. Similarly, during the nineteenth century, Ohio allowed the establishment of German-language public schools. *Id.* at 158.

[14] Heinz Kloss, *German-American Language Maintenance Efforts, in Language Loyalty in the United States. The Maintenance and Perpetuation of Non-English Mother Tongues by American Ethnic and Religious Groups* 206, 248-9 (Joshua A. Fishman et al. eds., 1966).

[15] *See* Shirley Brice Heath, *English in Our Language Heritage, in Language in the USA* 6, 9 (Charles A. Ferguson & Shirley Brice Heath eds., 1981) (discussing the "Muhlenberg legend").

Not only did the founders find it unnecessary to declare English the official language of their fledgling nation, but – as in the individual states – they were willing to use languages other than English for official purposes. For example, the Continental Congress had many of its proclamations translated and printed in German. It also authorized a German translation of the Articles of Confederation.[16]

Most of our nation's founders apparently believed that *any* regulation of language – whether English or another language – was antithetical to American democratic ideals. This is confirmed by the proposal of John Adams to establish the "American Academy for refining, improving, and ascertaining the English Language."[17] His efforts came to naught.[18] And when Noah Webster approached Chief Justice John Marshall for a Supreme Court endorsement of his dictionary, Justice Marshall refused, remarking that in America it was individuals rather than public bodies that dictate language use.[19]

In stark contrast to the French, who allow a national academy to banish foreign words from their language,

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[16] Heinz Kloss, *The American Bilingual Tradition* 26-7 (1977); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 284-7 (1992).

[17] Letter from John Adams to Samuel Huntington (Sept. 5, 1780), *in 7 The Works of John Adams* 249, 250 (Charles Francis Adams ed., 1852).

[18] *See* Shirley Brice Heath, *A National Language Academy?: Debate in the New Nation*, 189 Linguistics 9 (1977); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 295-303 (1992).

[19] Heath, *supra*, at 33.



Americans traditionally resist government dictates regarding language. No governmental agencies specify how we ought to spell words, for instance, even though English orthography is renowned for its inconsistencies. Thus, when President Theodore Roosevelt tried to have the Government Printing Office promote the simplified spelling of words like *tho*, *thru*, and *thoro*, he was rebuffed by Congress and subsequently limited his innovations to White House communications.[20]

Of course, as the facts of *Meyer v. Nebraska* illustrate, the American ideals of linguistic freedom have sometimes given way during times of great stress, just as other democratic freedoms sometimes do. There was a great deal of linguistic restrictionism during the anti-German hysteria surrounding World War I.[21] The same has been true at times of relatively high levels of immigration by non-English speakers, as during the last decade or two. Despite such lapses, however, regulation of language has always been inconsistent with our democratic ideals.

### C. International Experience Shows That Repressive Language Policies Stir Resentment Instead of Promoting Unity

Advocates of "English-only" laws often raise the specter of Quebec, Belgium or Sri Lanka as illustrative of the dangers that lurk in a multilingual country. One might add the Basque struggle for autonomy in Spain,

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[20] Dennis E. Baron, *Grammar and Good Taste: Reforming the American Language* 95 (1982).

[21] On the historical background of *Meyer v. Nebraska*, *see* William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution, 1917-1927* (1994).

and the ethnic strife now besetting the former Soviet republics, as well as the former Yugoslavia.[22] The assumption is that multilingual countries are inherently unstable or divided. Thus, a posited justification for Article 28 is that it will enhance unity by promoting a monolingual state.

In actuality, a common language is no guarantor of unity. Some of the bloodiest conflicts in history have taken place between groups that had no serious linguistic differences. Both the American Revolution and the Civil War pitched English speakers against other speakers of English. Nazi soldiers needed no interpreters to send German Jews to their deaths in the Holocaust. The recent genocide in the former Yugoslavia has occurred between groups – Serbs, Croats and Bosnian Muslims – who all speak a common language: Serbo-Croat.[23] And the slaughter of tens of thousands of people in Rwanda took place between two tribes – Hutus and Tutsis – speaking one language: Kinyarwanda. On a continent where many nations have dozens of languages, Rwanda is one of the few that is almost entirely monolingual.[24]

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[22] *See, e.g.*, Gutierrez v. Municipal Court, 861 F.2d 1187, 1192-93 (9th Cir. 1988) (Kozinski, J., dissenting), *vacated as moot*, 490 U.S. 1016 (1989) (discussing the "confrontation" between Anglophones and Francophones in Canada, as well as "the long-standing division between the French-speaking Walloons and the Flemish-speaking population of Belgium and . . . [t]he separatist movements by the Corsicans of France, the Basques of Spain, the Tamils of Sri Lanka, the Kurds of Turkey and Iraq, and the Sikhs of India").

[23] C. Hawkesworth, *Serbo-Croat, in 7 Encyclopedia of Language and Linguistics* 3857 (R.E. Asher ed., 1994).

[24] Ayo Bamgbose, *Language and the Nation: The Language Question in Sub-Saharan Africa* 16-17 (1991). Based on his study of African languages, Bamgbose notes that "[t]he association of multilingualism with divisiveness is unjustified, since language is only a convenient scapegoat on which the real causes of divisiveness are usually hung." *Id.* at 7.



Even if one accepts the premise that monolingualism promotes unity, artificially creating linguistic homogeneity by discouraging or even banning use of other languages often results instead in resistance and physical conflict.[25] Linguistic repression tends to ferment nationalism rather than appease it.

The Russian Empire attempted to use the Russian language to unify the diverse peoples within its territory as part of the policy: "One emperor, one religion, one language."[26] Although the Bolsheviks had a more progressive language policy when they first established their regime, they soon also began to promote the Russian language among the many linguistic minorities in the Soviet Union, with the ultimate aim of making Russian the language of a new Soviet nationality.[27] As current events have amply demonstrated, those coercive policies created at best a forced sense of unity. That compelled unity has disintegrated as republics such as the Ukraine,

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[25] *See* Dennis Baron, *The English-Only Question: An Official Language for Americans?* 180 (1990) ("Generally speaking, linguistic friction and violence occur around the globe not where language rights are protected, but where they have been suppressed.").

[26] Uriel Weinreich, *The Russification of Soviet Minority Languages*, 2 Probs. of Communism, no. 2, at 46 (1953).

[27] *See* Abdurakhman Avtorkhanov, *The Communist Party Apparatus* 318-22 (1966); Michael Bruchis, *The USSR: Language and Realities* 189-90 (1988); R.E. Weiner, *70 Languages Equal and Free?*, 6 Ariz. J. Int'l & Comp. L. 73 (1989).

Georgia and Lithuania left the union, and smaller nationalities such as the Chechens chafe at the Russian bit.

The situation in Canada can also be understood only against the background of history. Although both French and English have official status in Canada, the French language, and by extension its speakers, was long considered inferior to English. A royal commission reported in the 1960s that Francophones were below the Canadian average in socioeconomic terms.[28] Furthermore, the federal capital, federal administration, and armed services functioned almost entirely in English.[29] The commission concluded that French Canadians had achieved second-class status throughout Canada, even in Quebec.[30]

As several observers have noted, the true problem in Quebec is not official bilingualism, but the sense of legal and economic inferiority felt by Quebeckers.[31] Or as another commentator has remarked: "Separatist tendencies grow in Quebec in direct proportion to the perception that French-speaking Quebeckers are getting a raw deal from Anglophone Ottawa."[32] Only in the last few

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[28] 3 Royal Commission on Bilingualism and Biculturalism. Report. 61 (1969).

[29] 1 *id.* at 117-20 (1967); 3 *id.* at 294 (1969).

[30] 3 *id.* at 61. *See also* Milton J. Esman, *The Politics of Official Bilingualism in Canada, in Language Policy and National Unity* 45, 46 (William R. Beer & James E. Jacob eds., 1985).

[31] Hugo Baetens Beardsmore & Roland Willemyns, *Comment*, 60 Int'l J. Soc. Language 117, 121 (1986); Pierre van den Berghe, *The Ethnic Phenomenon* 211 (1981).

[32] Joseph E. Magnet, *Canadian Perspectives on Official English, in Perspectives on Official English: The Campaign for English as the Official Language of the USA* 53, 55 (Karen L. Adams & Daniel T. Brink eds., 1990).



decades have efforts been made to equalize the situation,[33] but by now it may be too late to heal the rift.

The situation is similar in Belgium, where a minority of the population natively speaks French (the Walloons) and the majority speaks Dutch (the Flemings). Historically, linguistic discord in Belgium arose from efforts by French speakers to dominate their Flemish countrymen.[34] Baetens Beardsmore and Willemyns observe:

> In spite of the constitutional equality of French and Dutch since the founding of the Belgian state in 1830, the de facto supremacy of French for over a century led to the statistical majority of Dutch-speakers in the country being downgraded to second-rate status within the national entity. The tensions engendered by this anomalous situation are revealed by the long and at times violent struggle lasting almost 150 years, of the Dutch-speaking part of the population to achieve equal linguistic status with their French-speaking compatriots, who were, moreover, the statistical minority. In other words, it is not bilingualism per se that has been at the origin of such tensions, but lack of equality for a statistical majority of the indigenous population.[35]

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[33] *See, e.g.* Joseph Magnet, *Language Rights: Canada's New Direction*, 39 U. New Brunswick L. J. 1 (1990) (discussing Official Languages Act of 1969).

[34] Matthias Hartig, *The Language Situation and Language Policy in Belgium, in Language Policy and National Unity* 67, 70 (William R. Beer & James E. Jacob eds., 1985).

[35] Hugo Baetens Beardsmore & Roland Willemyns, *Comment*, 60 Int'l J. Soc. Language 117, 121 (1986) (citations omitted).

In like fashion, the ethnic dispute in Sri Lanka is attributable in large part to Tamil feelings that their ethnicity and language were discriminated against by the majority Sinhalese. Ethnic relations on Sri Lanka worsened substantially in 1956 when the island enacted a "Sinhalese Only" law requiring all government officials to be able to speak the Sinhalese language (without requiring Sinhalese to learn the language of the Tamils). Consequently, many Tamils lost their government jobs.[36] Furthermore, like Article 28, the "Sinhalese only" law no doubt made it much more difficult for Tamils to interact with the Sinhalese-speaking government, something that would increase rather than reduce tensions.

The Basque separatist movement began as a protest against the repressive policies of Spanish dictator Francisco Franco, who attempted to banish the Basque and Catalan languages in favor of Spanish. The Franco policy has been characterized as "most drastic and oppressive attempt at unity in Spain."[37] Now that Spain has become a democracy in which Basques have substantial linguistic freedom, Basque terrorism seems to have become a thing of the past.

To sum up, using the words of Herbert Kelman: "language is a uniquely powerful instrument in unifying a diverse population."[38] Kelman warns, however, that

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[36] Thiru Kandiah, *Comment*, 60 Int'l J. Soc. Lang. 183 (1986); John-Thor Dahlburg, *Bitter Ethnic Struggle Sinks Roots Deeper in Sri Lanka*, L.A. Times, July 10, 1995 at A-1, A-6.

[37] Juan Cobarrubias, *The Protection of Linguistic Minorities in the Autonomous Communities of Spain*, in *Langue et Droit [Language and Law]* 399, 409 (P. Pupier & J. Woehrling eds., 1989).

[38] Herbert C. Kelman, *Language as an Aid and Barrier to Involvement in the National System, in Can Language Be Planned? Sociolinguistic Theory and Practice for Developing Nations* 21, 21 (Joan Rubin & Björn H. Jernudd eds., 1971).



when linguistic unity does not occur naturally, attempts to compel unity by promoting the language of a dominant group may unintentionally foster divisiveness. He cautions that "the *deliberate* use of language for purposes of national unity may – at least in a multiethnic state – have more disruptive than unifying consequences."[39] Forcing a common language on an unwilling population may come at great cost: "the probable loss in the regime's perceived legitimacy and the probable increase in social unrest."[40]

The consequences of discouraging or suppressing the use of a particular language are little different from the consequences of suppressing the content of speech. As stated by Thomas Emerson, "[s]uppression not only is ineffective in promoting general agreement or stability, but hinders the process by engendering hostility, resentment, fear, and other divisive forces."[41] *See also West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943).

In contrast to these repressive regimes, our country's relatively tolerant policy towards those who speak languages other than English has resulted in a type of linguistic unity that the tsars and Soviet leaders could only dream of. The 1990 census revealed that among the population of the United States above the age of five, only about three percent do not speak English well or very

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[39] *Id.*

[40] *Id.* at 37.

[41] Thomas I. Emerson, *The System of Freedom of Expression* 44 (1970).

well.[42] The carrot is obviously working much better than the stick.

Article 28 will not promote democracy, nor will it unify the people of Arizona. At best, it might encourage immigrants to Arizona to learn English somewhat more quickly. Yet, as we shall see below, it will not significantly advance even this more modest goal.

## II. ARTICLE 28 WILL NOT FOSTER A COMMON LANGUAGE

A more sophisticated justification for Article 28 is that it will promote the adoption in Arizona of a common language, which just happens to be English. This argument avoids the pitfalls encountered above: the false notion that limiting the ability of residents to communicate with the government or to vote will promote democracy. Rather, it rests on the premise that the State has an interest in promoting a common language through which it can interact with its citizens, and that Article 28 will advance that interest. *See* Brief Amicus Curiae of U.S., Inc., in Support of Petition for Writ of Certiorari at 3. Even if one assumes that the State has a legitimate interest in fostering a common language, however, Article 28 does not rationally further that goal.

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[42] Bureau of the Census, Dep't of Commerce, 1990 Census of Population: Social and Economic Characteristics, United States, table 13, at 13.



### A. Immigrants Are Already Learning English Rapidly; the Rate of Acquisition of English Will Be Determined by Social and Economic Factors, Not by Article 28

To justify Article 28 as promoting a common language, its proponents would have to demonstrate that it will increase the rate at which English is acquired by immigrants living in Arizona. In reality, immigrants are learning English at a rapid pace. Article 28 will not accelerate the process of English acquisition, which is governed by factors unrelated to the State's official language.

Research on language shift debunks the oft-repeated fear of the English-only movement: that immigrants (primarily Spanish speakers) are not adopting English quickly enough and that, like the Francophones of Quebec, they will soon be clamoring for a separate, or at least a bilingual, state. In reality, a recent Rand Corporation study has shown that Latinos follow the classic multi-generational shift to English. About half of immigrants born in Mexico who are permanent residents of the United States speak good English, and less than a quarter speak only Spanish. In the first generation of Mexican-Americans born in the United States, over 90% are proficient in English. By the second native generation, over half speak only English.[43]

A similar study by Calvin Veltman confirms that there is "very rapid movement to English on the part of Spanish language immigrants."[44] He also found that

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[43] Kevin F. McCarthy & R. Burciaga Valdez, *Current and Future Effects of Mexican Immigration in California: Executive Summary* 27-28 (1985).

[44] Calvin Veltman, *The Future of the Spanish Language in the United States* 44 (1988).

Hispanic immigrants shift from Spanish to English in two or three generations.[45] In fact, Veltman concludes, there is a substantial Spanish-speaking community in the United States only because of continued immigration from Spanish-speaking countries, not because Latinos refuse to learn English.[46] A 1995 study at the University of Southern California, based on the 1990 census, confirms the conclusions of the Rand and Veltman research.[47]

Perhaps the most important and obvious factor correlated to ability of immigrants to speak English is, therefore, how long they have lived in the United States.[48] Traditionally, the first generation maintains the mother tongue and learns English to a limited extent; the second generation is bilingual (generally with English dominance), and the third is typically monolingual in English.[49] While individuals and ethnic groups differ somewhat, recent immigrants to the United States, including Spanish speakers, are adhering to this classic model by switching to English in two or three generations.

Another important factor is the age of exposure to English. Very young children are heavily influenced by

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[45] *See id.* at 3.

[46] *See id.* at 109.

[47] Dowell Myers, *The Changing Immigrants of Southern California* 17-20 (Research Report No. LCRI-95-04R, Lusk Center Research Institute, School of Urban and Regional Planning, University of Southern California, 1995).

[48] *See* Calvin Veltman, *The Future of the Spanish Language in the United States* 40 (1988).

[49] Fernando Peñalosa, *Introduction to the Sociology of Language* 175-6 (1981).



the linguistic situation in the home, where immigrant parents typically speak their native languages. But once children attend school, they begin to learn English. Exposure to English increases as they move up the educational ladder and enter the workforce. Conversely, shift from one language to another is less likely after people reach their thirties and forties.[50]

The tendency for younger immigrants or children of immigrants to acquire English more quickly than their elders is related to findings by linguists that people generally learn a second language more readily when they are young. One study, for example, found that those who immigrate to the United States between the ages of three and seven acquire English language skills equivalent to native born children. Those who arrive between the ages of eight and fifteen have greater difficulties, while those arriving between the ages of seventeen and thirty-nine have the greatest difficulties of all.[51]

Socio-economic factors are also important determinants for the rate of English acquisition. There is a direct correlation between ability to speak English and higher

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[50] Calvin Veltman, *Language Shift in the United States* 20 (1983).

[51] The research is summarized in Steven Pinker, *The Language Instinct: How the Mind Creates Language* 290-91 (1994).

income levels.[52] As shown in greater detail below, immigrants are well aware of the economic and other benefits of learning English.

In light of these and other social and economic forces, Arizona's prohibition against official use of other languages will have virtually no effect. Scholars generally agree that laws favoring English do not cause immigrants in the United States to became Anglicized. As Heinz Kloss phrased it, the nationalities were assimilated not by governmental coercion, but rather "by the absorbing power of the highly developed American society."[53]

### B. Immigrants Are Well Aware of the Advantages of Acquiring English, Regardless of Arizona's Strict English-Only Law

Article 28 is not necessary to encourage immigrants to adopt our common language; speakers of other languages in Arizona and elsewhere are already quite cognizant of the need to learn English. For example, the Phoenix Union High School District has classes devoted to teaching English for Speakers of Other Languages. Students must often fight for limited space, and some class locations have a six-month waiting list.[54] But they

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[52] Kenji Hakuta, *Mirror of Language: The Debate on Bilingualism* 167 (1986). *See also* Jon Amastae, *Official English and the Learning of English, in Perspectives on Official English: The Campaign for English as the Official Language of the USA* 199, 203 (Karen L. Adams & Daniel T. Brink eds., 1990) (observing that among Spanish speakers, English dominance tends to rise with socio-economic status).

[53] Heinz Kloss, *The American Bilingual Tradition* 283 (1977).

[54] Barbara Yost, *Immigrants on Waiting List for English Classes; U.S. Newcomers on Track to Crack Language Barrier*, The Arizona Republic, Oct. 29, 1995, at G9.



are eager to learn English. Mikhail Urikh, originally from the Ukraine, remarks: "I need (to) learn English because I can't read newspaper."[55] Anna Miksa, from Serbia, wants to speak English better so that she can talk to Americans and "know what's going on in the United States."[56] Similar thoughts were expressed by Van Lam, recently from Vietnam: "I very want to learn English because it's important to me. I can speak to everybody. I can get a better job."[57] A teacher summed up the attitudes of her students: immigrants do not need to be forced to learn English; they want to communicate.[58] In fact, immigrants are so eager to learn English that the demand for classes often outstrips the supply.[59]

The punitive approach of Article 28 is not necessary to convince immigrants of the advantage of knowing English. Children with limited English proficiency will learn to speak it in school. Their parents will probably acquire it somewhat more slowly and less fluently. And their grandparents, if they entered this country at a late

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[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *See, e.g.*, Jon Amastae, *Official English and the Learning of English, in Perspectives on Official English* 199, 201 (Karen L. Adams & Daniel T. Brink eds., 1990) (commenting on the large numbers of Spanish speakers who register for adult education programs teaching English as a Second Language); Laura Randall, *America's Ethnic Diversity Spawns Language Conflicts*, L.A. Times, Sept. 5, 1993, at A-4, A-5 (noting that there are large numbers of Latinos and other minorities who are clamoring to learn English, but that waiting lists and teacher shortages plague English-language centers across the country).

age, may not learn much at all. That is simply the immigrant experience, related to differences in people's ability and opportunity to acquire new languages. Article 28 will do nothing to change it.

### C. Arizona Has a Far More Effective and Less Intrusive Means of Reaching Its Stated Goal: Teaching English to Its Residents

The justifications for Article 28 fade even more in light of the fact that Arizona already has a fully constitutional, easily implemented, and currently funded means of advancing widespread knowledge of a common language: education. While other factors that encourage English acquisition are virtually impossible for the State to control, Arizona is well within its authority in requiring that children attend school. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Furthermore, Arizona can and does require that children learn English while there. Ariz. Rev. Stat. Ann. § 15-752 (1991).

As long as the public educational system teaches English to all the State's children, the State's goal of fostering a common language will invariably be met.[60] In fact, this Court has held that public school systems must effectively teach children to speak English, noting that "[b]asic English skills are at the very core of what these public schools teach." *Lau v. Nichols*, 414 U.S. 563, 566 (1974). Studies have shown that immigrant children can

[60] Unfortunately, some of the same xenophobic forces that have sponsored measures such as Article 28 have recently advocated excluding immigrant children who are illegally in this country from attending public schools. Such a policy would create the very real possibility of a foreign enclave in the United States where few people speak English.



quickly acquire English in school.[61] Arizona thus has at its ready disposal a means of reaching its stated goal that is both far more effective than Article 28, and does not require trampling on anyone's constitutional rights.

## III. ARTICLE 28 WILL NOT PROTECT PUBLIC CONFIDENCE OR PREVENT DISILLUSIONMENT AND CONCERN

Proponents of Article 28 argued before the Ninth Circuit that the measure is necessary to protect public confidence in the government and prevent "disillusionment and concern." The public's lack of confidence and concern would apparently arise because recent immigrants are not acquiring English quickly enough, or wish to establish non-English-speaking enclaves within Arizona, or to make Arizona an officially multilingual state. These fears, as has been shown above, are simply not supported by the evidence.

In actuality, much to the dismay of many linguists, the assimilating power of the American educational system, mass media, and economy, to mention just some factors, is so strong that most immigrants, as well as many American Indians, are not only acquiring English, but are abandoning their native languages in the bargain. This phenomenon is now so well documented that it has been given a name: *subtractive bilingualism*, in which acquisition of a second language replaces the first, rather

[61] Calvin Veltman, *Language Shift in the United States* 62-67 (1983).

than adding a language to the speaker's linguistic repertoire.[62] Linguist Joshua Fishman, one of the world's leading experts on bilingualism and language policy, expressed it thus:

> Without either constitutional or subsequent legal declaration or requirement that English is the official (let alone national) language, a complex web of customs, institutions, and programs has long fostered well-nigh exclusive reliance upon English in public life. The result of two centuries of the foregoing is that literally hundreds of millions of Americans have been led, cajoled, persuaded, embarrassed into, and forced to forget, forego, and even deny . . . their mother tongues."[63]

If Arizona citizens have cause to be dismayed and concerned, it should not be because a few older immigrants, or Havasupai who have spent their lives in their homeland in the Grand Canyon, feel more comfortable dealing with a sympathetic government official in a language other than English. Rather, they should be concerned that virtually all descendants of immigrants eventually lose the ability to speak their ancestral languages, depriving America of a tremendous opportunity to be more competitive internationally. And they should be dismayed that America's indigenous languages are disappearing at a rapid rate, cutting off an important link to the original cultures of this continent. There is simply no reasonable basis for fears or concerns that immigrants

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[62] *See, e.g.*, Suzanne Romaine, *Bilingualism* 107-8 (1989).

[63] Joshua Fishman, *Language Policy: Past, Present, and Future, in Language in the USA* 516, 517 (Charles A. Ferguson & Shirley Brice Heath eds., 1981).



are not learning English. To the contrary, linguistic assimilation in the United States is working only too well.

This is not to say that people are not often fearful of, or concerned about, or simply annoyed by, the use of foreign languages. The relatively large levels of immigration during the past decade or two, accompanied by a high growth rate among recent arrivals, has led to a comparatively large population of immigrants and their children, and thus a substantial population of speakers of other languages. If the disillusionment or concern of supporters of Article 28 arises from the greater number of immigrants in our country recently, an official English law is obviously not a rational response. Immigration is a Federal question, and those concerned by it are free to seek changes in Federal immigration policy.

The only real "concerns" that Article 28 can address are xenophobic fears or dislike of other languages and their speakers. Such sentiments seem to have motivated several cities in the Los Angeles area to restrict business signs containing non-Roman scripts. *See Asian American Business Group v. City of Pomona*, 716 F. Supp. 1328 (C.D. Cal. 1989) (invalidating ordinance that required local business signs using "foreign alphabetical characters" to devote at least one-half of the sign to "advertising copy in English alphabetical characters"). Clearly, however, fear or dislike of foreign languages and orthographic systems, or foreign customs, no matter how much "disillusionment" they cause, does not justify their repression.

## IV. ARTICLE 28 WILL NOT PROMOTE GOVERNMENTAL EFFICIENCY AND EFFECTIVENESS

There is no serious argument to be made that Article 28 promotes the efficiency of the State government. As

long as there are residents of Arizona who do not speak English very well and need to interact with the government, their communications will invariably be more efficient if the relevant state official speaks the language of the affected residents. The defendants below conceded this very obvious point. Plaintiff's and Defendants' Statement of Stipulated Facts 15-17, attached to Brief in Opposition [to Petition for Writ of Certiorari] of Respondent Yniguez.

## CONCLUSION

The justifications offered in support of Article 28 disappear upon closer analysis. At the same time, its burdens are substantial, because Article 28 will sever all direct communications between state officials and residents who speak limited or no English. The judgment of the Court of Appeals for the Ninth Circuit should therefore be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

ARIZONANS FOR OFFICIAL ENGLISH, *et al.*,
*Petitioners,*

v.

STATE OF ARIZONA,
MARIA-KELLEY YNIGUEZ, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

**BRIEF OF *AMICI CURIAE* UNITED STATES REPRESENTATIVE NYDIA M. VELAZQUEZ, CONGRESSIONAL HISPANIC CAUCUS, CONGRESSIONAL ASIAN PACIFIC AMERICAN CAUCUS, NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS AND 32 INDIVIDUAL MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

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**ADDITIONAL *AMICI CURIAE* LISTED INSIDE *FRONT COVER***

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## INTEREST OF *AMICI CURIAE*

*Amici* are two Caucuses of the United States Congress, one national organization of state and local elected and appointed officials, 32 individual United States Senators and Representatives not affiliated with the Caucuses,

and one state legislator from New Mexico who is currently campaigning for the United States Congress. Together, these *amici* represent over 42 million people in this country, including over 2.9 million people who are not proficient in English or who do not speak English at all.

*Amici* are interested in and directly affected by this case for two reasons. First, a provision such as Article XXVIII of the Arizona Constitution ("Article XXVIII") would substantially impede the ability of legislators to communicate with -- and thereby represent -- their constituents who are not proficient in English. Second, because a number of "official English" provisions are currently pending in Congress, *amici* wish this Court to be aware of the practical effect of such provisions on legislators before it rules on their constitutionality. The purpose of this brief, therefore, is to demonstrate that practical effect and to show why that effect violates the First Amendment rights of elected representatives in this country.

The Congressional Hispanic Caucus ("CHC") is an informal bipartisan group of 18 Members of Congress of Hispanic descent. CHC is dedicated to voicing and advancing, through the legislative process, issues affecting Hispanic Americans in the United States and the insular areas. Founded in 1976 as a legislative service organization of the United States House of Representatives, CHC is now organized as a congressional member organization, governed under the Rules of Congress. The following CHC member United States Representatives join as *amici*: Nydia M. Velázquez (12th Dist., New York), Xavier Becerra (30th Dist., California), Lincoln Diaz-Balart (21st Dist., Florida), E (Kika) de la Garza (15th Dist., Texas), Henry B. Gonzalez (20th Dist., Texas), Luis V. Gutierrez (4th Dist., Illinois), Robert Menéndez (13th Dist., New Jersey), Solomon P. Ortiz (27th Dist., Texas), Ed Pastor (2nd Dist., Arizona), Bill Richardson (3rd Dist., New Mexico), Carlos Romero-Barceló (Puerto Rico), Ileana



Ros-Lehtinen (18th Dist., Florida), Lucille Roybal-Allard (33rd Dist., California), José E. Serrano (16th Dist., New York), Frank Tejeda (28th Dist., Texas), Esteban E. Torres (34th Dist., California), and Robert Underwood (Guam).

The Congressional Asian Pacific American Caucus ("CAPAC") is a group of ten members of Congress which was founded in 1994 to increase and enhance the ability of Members of Congress and their allies to represent effectively the Asian American and Pacific Islander community's concerns in policy debates. The following members of CAPAC join as *amici*: United States Senators Daniel K. Akaka (Hawaii) and Daniel K. Inouye (Hawaii) and United States Representatives Neil Abercrombie (1st Dist., Hawaii), Eni F.H. Faleomavaega (Samoa), Robert T. Matsui (5th Dist., California), Patsy T. Mink (2nd Dist., Hawaii), Nancy Pelosi (8th Dist., California), and Robert Underwood (Guam).

The National Association of Latino Elected and Appointed Officials ("NALEO") is a non-partisan, national organization which seeks to advance the health, social, economic, and educational welfare of Americans of Hispanic origin or descent. NALEO provides information and assistance on legislative and governmental actions affecting Hispanics and other disadvantaged groups. The membership of NALEO is open to all individuals committed to the objectives of the organization. NALEO has approximately 300 members, including Members of Congress and elected and appointed state and local officials. Several members of CHC are also members of NALEO.

The following members of the United States Congress who are not members of either CHC or CAPAC but share concerns about the constitutionality of Article XXVIII also join this brief as *amici*: Senators Edward M. Kennedy (Massachusetts), Carol Moseley-Braun (Illinois) and Paul Simon (Illinois), and Representatives Howard L. Berman (26th Dist., California), James E. Clyburn (6th Dist., South Carolina), Ronald D. Coleman

(16th Dist., Texas), John Conyers, Jr. (14th Dist., Michigan), Ronald V. Dellums (9th Dist., California), Julian C. Dixon (32nd Dist., California), Sam Farr (17th Dist., California), Chaka Fattah (2nd Dist., Pennsylvania), Floyd H. Flake (6th Dist., New York), Victor O. Frazer (Virgin Islands), Alcee L. Hastings (23rd Dist., Florida), Jesse Jackson, Jr. (2nd Dist., Illinois), Matthew G. Martinez (31st Dist., California), Jim McDermott (7th Dist., Washington), Cynthia McKinney (11th Dist., Georgia), Carrie Meek (17th Dist., Florida), Jerrold Nadler (8th Dist., New York), Eleanor Holmes Norton (District of Columbia), John W. Olver (1st Dist., Massachusetts), Major R. Owens (11th Dist., New York), Donald M. Payne (10th Dist., New Jersey), Charles B. Rangel (15th Dist., New York), Patricia Schroeder (1st Dist., Colorado), Louise M. Slaughter (28th Dist., New York), Pete Stark (13th Dist., California), Edolphus Towns (10th Dist., New York), Maxine Waters (35th Dist., California), Melvn L. Watt, (12th Dist., North Carolina), and Albert R. Wynn (4th Dist., Maryland). In total, 56 Members of Congress join this brief as *amici*. In addition, New Mexico State Representative E. Shirley Baca, who is currently campaigning for the United States Congress, also joins as *amicus*.

All parties have consented to the participation of *amici*, and consent letters from counsel have been lodged with the Clerk of the Court.

## SUMMARY OF ARGUMENT

Article XXVIII is unlike provisions of other state laws that merely proclaim English to be the state's "official" language. Instead, the broad terms of Article XXVIII place a prohibition on governmental communications in any language other than English, a prohibition that, as the Ninth Circuit held, includes communications between elected officials and their constituents.



*Amici*, who are legislators and other elected officials, communicate every day with countless of their constituents in languages other than English. If *amici* were limited to speaking in English only, they would be unable to represent effectively the *entirety* of their constituencies because many of their constituents are not proficient in English. Communications with constituents by *amici* Members of Congress, many of whom were members of state legislatures before joining the Congress, vividly illustrate the types of communications that a provision like Article XXVIII would prohibit if it were allowed to stand. These communications, conducted personally by *amici*, and through staff, are necessary for legislative fact finding and to inform *amici*'s political debate; for providing necessary services to constituents; and for communicating with the electorate during political campaigns. Article XXVIII would shut off all of these communications and leave legislators without information necessary to represent non-English speaking portions of their constituencies, and leave these constituents without vital information about the business of our government.

Such a result plainly violates the First Amendment. Free speech between legislators and their constituents is central to our democratic system, and is entitled to the greatest measure of protection under our Constitution. As this Court has held, the state simply has no interest in limiting the capacity of a legislator to discuss matters of public policy with his constituents. *Bond* v. *Floyd*, 385 U.S. 116 (1966). Yet this is precisely what Article XXVIII does by prohibiting legislators from communicating with their constituents in languages other than English. In addition, Article XXVIII violates the First Amendment rights of legislators by limiting their capacity to discuss issues of public policy with their constituents as they relate to election campaigns -- political speech that is also entitled to the greatest protection under the First Amendment.

Article XXVIII is also contrary to the historical backdrop of the First Amendment and the Fourteenth Amendment, both of which were enacted against our historical tradition of governmental actors communicating with their constituents in languages other than English. Our long history of legislators speaking with their constituents in languages other than English also belies the arguments made by Petitioners and their *amici* that our democracy is threatened by allowing legislators who wish to do so to communicate with their constituents in languages other than English.

*Amici* believe that all people in this country should be encouraged to learn English so that they may participate to the fullest extent in our national political life. *Amici* also believe that non-English-speaking Americans have vital contributions to make to our political discourse, and should not be prevented from participating in our government while they work to become fluent in English. Petitioners present no cogent reason, much less a compelling one, why those who do not speak English, who are citizens and tax payers, should be prevented from participating in the political process and shut off from communicating with the legislators whom they elected to represent their interests. Article XXVIII's prohibition on such communications violates the First Amendment and should not be allowed to stand.

## ARGUMENT

### I. ARTICLE XXVIII VIOLATES THE FIRST AMENDMENT RIGHTS OF LEGISLATORS BY INHIBITING THEIR ABILITY TO COMMUNICATE WITH THEIR CONSTITUENTS IN LANGUAGES OTHER THAN ENGLISH

By prohibiting all government officials and employees from using any language other than English when communicating with the people they serve, Article XXVIII is more restrictive than any other "official



English" provision in existence in our country. As the Ninth Circuit expressly held, Article XXVIII even limits communications between legislators and their constituents. The experience of *amici*, as shown below, illustrates the numerous kinds of communications between legislators and their constituents that would be inhibited by Article XXVIII. Such inhibitions on speech, as also shown below, plainly violate the First Amendment.

#### A. The Broad Terms of Article XXVIII Limit Speech by Legislators to Their Constituents

Even to those who might otherwise favor adoption of English as an "official language," the breadth of Article XXVIII is, quite simply, astounding.[1] Section 1 of Article XXVIII declares English to be the "official language of . . . all government and actions," and states

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[1] By providing that all governmental communications may be in English only, Article XXVIII is uniquely restrictive when compared to other state provisions establishing English as the state's "official language." Indeed, the official English provisions of four states expressly allow governmental communications in languages other than English. *See* 1995 Mont. Laws 319; Va. Code Ann. §7.1-42; 1996 Wyo. Sess. Laws 34; *Puerto Rican Org. for Political Action* v. *Kusper*, 490 F.2d 575 (7th Cir. 1973) (interpreting Illinois' "official-English" statute).

Thirteen other states have either passed legislation or amended their constitutions to establish English as their official language, without any further elaboration. *See* Ala. Const. amend. 509; Ark. Code Ann. § 1-4-117 (Michie 1987); Cal. Const. art. III, § 6; Colo. Const. art. II, § 30a; Fla. Const. art. II, § 9; 1986 Ga. Laws 529; Haw. Const. art. XV, § 4; Ind. Code Ann. § 1-2-10-1 (West 1996); Ky. Rev. Stat. Ann. § 2.013 (Baldwin 1996); Miss. Code Ann. § 3-3-31 (1993); Neb. Const. art. I, § 27; N.C. Gen. Stat. § 145-12; N.D. Cent. Code § 54-02-13. The essentially symbolic nature of many of these laws (Arkansas, Hawaii, Indiana, Kentucky, Mississippi, North Carolina, North Dakota, South Carolina (S.C. Code Ann. § 1-1-696 (Law Co-op 1993)) and South Dakota (S.D. Codified Laws Ann. § 1-27-20 (1996))) is emphasized by their placement in sections of their respective state codes relating to other symbols such as the state bird, song, or motto.

that Article XXVIII applies to "the legislative, executive and judicial branches of government," and to "all government officials . . . during the performance of government business." Article XXVIII, § 1. Section 3 of Article XXVIII then provides that (with certain exceptions not here relevant) "[t]his State . . . shall act in English and no other language." Article XXVIII, § 3(1)(a). As the Ninth Circuit held, Article XXVIII's "plain language broadly prohibits all government officials and employees from speaking languages other than English in performing their official duties . . . ." *Yniguez* v. *Arizonans for Official English*, 69 F.3d 920, 931 (9th Cir. 1995) (en banc). And as the Ninth Circuit also held, the broad terms of Article XXVIII clearly encompass non-English speech by legislators in the course of performing their duties as representatives of the people. *Id.* at 932 ("Article XXVIII on its face applies to speech in a seemingly limitless variety of governmental settings [including] town-hall discussions between constituents and their representatives").

Accordingly, Petitioners' *amici*, the Washington Legal Foundation, *et al.* ("WLF"), are wrong to contend that Article XXVIII applies only to the "legislative function" of legislators, and does not affect speech between legislators and their constituents. *See* Brief of the Washington Legal Foundation, *et al.* as *Amici Curiae* in Support of Petitioners ("WLF Brief") at 7. Certainly, nothing in the language of Article XXVIII or the Ninth Circuit's construction of it supports that view. [2] In fact,

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[2] This Court generally defers to interpretations of state law made by the courts of appeals. *See Frisby* v. *Schultz*, 487 U.S. 474, 482 (1988); *Pembauer* v. *City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986). This is especially true where, as here, the district court and the court of appeals agree on the proper interpretation of state law. *See Bishop* v. *Wood*, 426 U.S. 341, 346 (1976) ("this Court has accepted an interpretation of state law in which the District Court and Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion").



the only authorities WLF cites in support of the purported limitation of Article XXVIII to "legislative acts" address the entirely different issue of the reach of the Speech or Debate Clause in the United States Constitution and the analogous provision of the Arizona Constitution. *See, e.g., United States* v. *Brewster*, 408 U.S. 501 (1972); *Gravel* v. *United States*, 408 U.S. 606 (1972). Using this inapposite body of law, WLF concludes first that Article XXVIII, as applied to legislators, reaches only speech on the floor of the legislative chamber and in legislative committees, and then concludes that a prohibition on non-English speech within that sphere raises no difficulty under the First Amendment. WLF Brief at 8-10. But, if Article XXVIII were intended to reach no farther than speech used on the floor of the legislative chamber and in committee hearings -- which is certainly not what the language of Article XXVIII states -- the provision would apply *only* to speech that *may not be regulated* under the Arizona equivalent of the federal Speech or Debate Clause. *See* Ariz. Const. art. 4, § 7 ("No member of the Legislature shall be liable in any civil or criminal prosecution for words spoken in debate."). This would make the provision nonsense for it would then have no effective application to legislators at all. [3]

Thus, contrary to WLF's view, Article XXVIII limits non-English speech that is engaged in every day by legislators and their staff members with constituents concerning public policy and the daily workings of government. Article XXVIII furthermore presents a real and substantial chilling effect on speech by legislators to their constituents in the course of an election campaign, or that is arguably part of an election campaign. While *amici* recognize that one could argue that speech made in an election campaign is not covered by Article

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[3] *See United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("a statute must, if possible, be construed in such a fashion that every word has some operative effect") (citations omitted).

XXVIII because it is not "government business," such an argument assumes that a clear line can be drawn between "campaign" speech by a legislator and "non-campaign" speech. Of course, such line drawing is not possible. Most Members of Congress are constantly running for re-election, and are also constantly serving and communicating with their constituents. Such legislators should not be left to guess whether a given speech or constituent communication will be deemed "campaign" or "non-campaign" speech, since most of what they do serves both purposes.[4] And yet, as illustrated below, many elected representatives could not serve either purpose effectively if they could not freely speak in languages other than English.

### B. The Recurring Non-English Communications Between *Amici* and Their Constituents Demonstrate the Harm Article XXVIII Would Cause to Legislators and to the Democratic Process

As legislators and elected officials, *amici* communicate every day with countless of their constituents. Many of *amici*'s constituents do not speak English well or do not speak English at all. Consequently, many of these communications by *amici* and their staff members are in a language other than English. Indeed, some *amici* would find it impossible to fairly represent substantial portions of their constituencies at all if they were required to communicate only in English when performing government business.

*Amici* find it necessary to communicate, both orally and in writing, with their constituents in a variety of languages in order to consider proposed legislation and to conduct legislative fact finding; to provide

[4] Of course, because Article XXVIII applies only to government employees and officials, a private person running for office against an incumbent legislator would not be under the same restrictions in campaigning and could freely address the electorate in the language of his or her choice.



information and services to constituents; and to inform the electorate for purposes of running for re-election. Many *amici* Members of Congress were formerly members of state legislative bodies, and their interactions with constituents in the United States Congress mirrors those in which they engaged as state legislators. Some examples of these non-English communications show both the breadth of these communications and their importance to *amici*'s ability to represent their constituents.

Representative Ileana Ros-Lehtinen, a CHC member who previously served in both houses of the Florida legislature, currently represents the 18th District in Florida, which includes part of the Miami area. Her experience in a district where 26.6 percent of the population is not proficient in English[5] provides a good example of the range of a legislator's communications that could be chilled or prohibited by a provision like Article XXVIII. First, Spanish is the primary language of many of the community meetings Congresswoman Ros-Lehtinen attends to inform her constituents about her activities in Congress and to gain information from them necessary to represent their views. Second, Congresswoman Ros-Lehtinen relies heavily on Spanish language media to communicate her views to her constituents. Finally, every day the staff members in the Congresswoman's district office speak Spanish with constituents who are not proficient in English. A substantial amount of this work relates to providing information about visa and citizenship issues -- information which many constituents of the 18th District

[5] 1990 U.S. Census Data, *Age By Language Spoken at Home and Ability to Speak English*, 1990 Census Lookup (C905STF3D Database) 835278401 [hereinafter *Ability to Speak English*]. In the 1990 Census, people were asked to categorize themselves as speaking English "very well," speaking English "well," or speaking English "not well or not at all." *Id.* For purposes of this brief, people who identified themselves as speaking English "not well or not at all" are described as not proficient in English.

would simply do without if the Congresswoman's staff were prohibited from speaking Spanish.

Representative Ed Pastor, Chairman of the CHC, represents the 2nd Congressional District of Arizona, where 9.3 percent of the population is not proficient in English.[6] Through the staff members in his district office, Congressman Pastor communicates daily in Spanish with his constituents and also frequently conducts citizenship drives in the Tucson and Phoenix areas which would not be possible if the Congressman's staff were required to speak in English only.

Representative Robert Underwood of Guam, a member of both CHC and CAPAC, is fluent in both English and Chamorro (the native language of Guam) and frequently holds meetings with his constituents that are conducted in both languages. If Congressman Underwood were prohibited from communicating with his constituents in Chamorro, he would be unable to discuss his activities in Congress with large portions of his constituency. Congressman Underwood also relies on the use of both Chamorro and Tagalog in campaigning for re-election.

Congressman Xavier Becerra, a CHC member, frequently uses Spanish to communicate with his constituents in the 30th District of California, where 27.6 percent of the population is not proficient in English.[7] Earlier this year, Congressman Becerra participated in a congressional forum that was convened to investigate a widely publicized incident involving California law enforcement officers who used excessive force after apprehending 21 Hispanics in Riverside. The Congressman communicated the findings of the forum in Spanish to the Spanish language media and to non-English speaking constituents who had expressed fear for their safety.

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6 *Id.* at 835215600.

7 *Id.* at 835277674.



Representative Neil Abercrombie, a member of CAPAC, represents the First District of Hawaii, a district in which 5.6 percent of the population is not proficient in English.[8] Members of Congressman Abercrombie's staff speak with constituents on a daily basis in Tagalog, Ilocano, Hawaiian, and Japanese, as well as English. Congressman Abercrombie is regularly interviewed in Japanese on a Japanese-language radio station and places campaign advertisements in newspapers in Japanese and Tagalog.

Representative Ronald D. Coleman represents the 16th Congressional District of Texas, which includes El Paso and the surrounding area, where 14.3 percent of the residents are not proficient in English.[9] Congressman Coleman employs bilingual staff members both in Washington and in his district offices because approximately 25 percent of the casework inquiries to his office are made in Spanish.[10] Congressman Coleman provides much of his office literature and newsletters in both English and Spanish. In addition, Congressman Coleman has recruited witnesses for congressional committee hearings who do not speak English, and it is necessary for him to provide translations of their testimony to the committee. Congressman Coleman also relies on Spanish language

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8 *Id.* at 835279229. Before being elected to the United States Congress, Congressman Abercrombie served for a total of 12 years in the Hawaii House of Representatives and the Hawaii Senate.

9 *Id.* at 835279402. Congressman Coleman was a member of the Texas legislature from 1973 until 1982.

10 Some specific examples of assistance provided in Spanish by Congressman Coleman's office include work to ensure that the proper assistance was provided through the Federal Emergency Management Agency to the residents of a small town that was devastated by a tornado, and the recruiting of Hispanic students to apply for our nation's military service academies. The parents of many of these students do not speak English and rely on Congressman Coleman's staff to explain the application process.

media to communicate with his constituents and to campaign for re-election.

Congressman Carlos Romero-Barceló, a member of CHC, represents Puerto Rico where the official languages are English and Spanish. Most of Congressman Romero-Barceló's communications with his constituents are in Spanish, and the majority of the Congressman's staff are bilingual in Spanish and English. Press releases from the Congressman's office are usually in Spanish because Spanish-language media dominate the Puerto Rican market. Congressman Romero-Barceló also speaks Spanish with an overwhelming majority of his constituency in campaigning for re-election.

Representative Nydia M. Velázquez, a CHC member, represents the 12th District of New York where 24.4 percent of the population is not proficient in English. [11] The staff of Congresswoman Velázquez's district offices communicates with constituents in Spanish on a daily basis, and has translated several forms concerning applications for citizenship and Section 8 housing into Spanish to encourage constituents to complete the forms themselves, rather than relying on staff to ensure the forms are completed correctly. [12]

CHC member Congresswoman Lucille Roybal-Allard represents the 33rd District in California, where 31.6

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11 *Ability to Speak English* at 835278791.

12 Bilingual staff members in the Congresswoman's district office were able to prevent the wrongful eviction of one constituent, a young single mother, who was nearly evicted from Section 8 housing because she had failed to complete some paperwork from the government. The woman, who spoke only Spanish, had not completed the paperwork because she did not understand it and was afraid that to complete it incorrectly would jeopardize her housing. At the brink of an eviction proceeding, bilingual staff members in the Congresswoman's district office assisted the woman in completing the proper forms and allowed her to stay in her home.



percent of the population is not proficient in English. [13] Seven of the eight staff members in Congresswoman Roybal-Allard's district office speak both Spanish and English, and frequently use Spanish in responding to constituent requests, and in speaking with constituents at community meetings and school PTA meetings. The Congresswoman's newsletter is in both Spanish and English and she relies on Spanish in speaking with her constituents as part of campaigning for re-election.

Representative José Serrano, a CHC member, represents the 16th District of New York in the South Bronx, where 14.6 percent of the population is not proficient in English. [14] Congressman Serrano regularly relies on Spanish to discuss legislative policies with his constituents and to communicate with his constituents through the media because most of the local media, on which many of his constituents rely for their daily information, is in Spanish. Nine of the thirteen members of the Congressman's current staff are bilingual in Spanish and English. [15] In a single month, Congressman Serrano's district office receives as many as 500 calls for information on immigration matters from constituents who speak little or no English. If staff members were prohibited from communicating in Spanish, they would be unable to help these constituents gain work authorization, apply for citizenship, or bring family members into the United States as the law provides.

All of these activities constitute government business. All of them are at the core of what legislators do to make the democratic process work. And, as next shown, if they all were arbitrarily prohibited by a provision like Article XXVIII, the First Amendment rights of legislators plainly would be violated.

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13 *Ability to Speak English* at 835215821.

14 *Id.* at 835278711.

15 Congressman Serrano similarly relied on bilingual staff members when he previously served in the New York Assembly.

### C. Article XXVIII Prohibits Speech By Legislators That is At the Core of Speech Protected by the First Amendment

The First Amendment's guarantee of uninhibited discussion on public issues [16] is nowhere more important than where that discussion is between legislators and those they are elected to serve. In fact, speech between elected representatives and those they represent is central to our democracy. *See, e.g., Doe* v. *McMillan*, 412 U.S. 306, 328 (1973) (Douglas, J., concurring) ("A legislator's function in informing the public concerning matters before Congress or concerning the administration of Government is essential to maintaining our representative democracy."); *The Federalist No. 56*, at 346 (James Madison) (Clinton Rossiter ed., 1961) ("It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents."). Indeed, like the statute at issue in *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 64 U.S.L.W. 4663 (1996), the difficulty posed by Article XXVIII is "its stifling effect on the ability of [an elected representative] to do what [he] exists to do," namely, represent his constituents. *Id.* at 4670 (Kennedy, J., concurring in the judgment and dissenting in part).

Although this Court has never addressed the constitutionality of a provision like Article XXVIII, it has often considered the First Amendment protections afforded to speech by legislators and elected officials. A review of those precedents makes clear that Article XXVIII is unconstitutional.

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16 It is well settled that the "First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964) (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964)).



In *Bond* v. *Floyd*, *supra*, this Court considered the First Amendment rights of state elected officials, and held that the Georgia legislature could not prevent Julian Bond from taking his seat as a member of the Georgia legislature based on political statements he had made. The Court held that "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." 385 U.S. at 135-36. The Court rejected Georgia's argument that although a private individual could not be prohibited from making such statements, the state could demand a higher standard from its elected officials. *Id.* at 132-33. Such a requirement was unacceptable, the Court held, because the state had "no interest in limiting its legislators' capacity to discuss their views of local or national policy." *Id.* at 135 (footnote omitted). Article XXVIII would effectively impose such a limitation here.

Indeed, Petitioners do not dispute the Ninth Circuit's conclusion that Article XXVIII's sweeping prohibitions on non-English speech would most certainly violate the First Amendment if applied to ordinary citizens. *See Yniguez*, 69 F.3d at 937 ("A state cannot simply prohibit all persons within its borders from speaking in the tongue of their choice."); *see also Meyer* v. *Nebraska*, 262 U.S. 390, 401 (1923) ("[p]erhaps it would be highly advantageous if all had ready understanding of our ordinary [English] speech, but this cannot be coerced by methods which conflict with the Constitution"). Under *Bond*, a higher standard may not be applied to elected representatives. If it could, as this brief shows, those representatives could not do the job they were elected to do.

While the limitations on a legislator's day-to-day communications with his or her constituents is enough to invalidate a provision like Article XXVIII, as earlier noted this provision is unconstitutional for another reason: it prohibits communications by elected officials concerning elections, either their own re-election or the

election of others. This Court has repeatedly recognized that communications in the course of an election are central to our democracy. *See Brown* v. *Hartlage*, 456 U.S. 45, 53 (1982) (per curiam) ("The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy -- the political campaign."). As the Court noted in *Buckley* v. *Valeo*, 424 U.S. 1, 52-53 (1976) (per curiam), "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." [17] Obviously, a legislator cannot speak "intelligently" to the electorate if he or she is forced to speak in a language that particular electorate does not understand.

Furthermore, Petitioners have plainly presented no compelling governmental interest that supports the limitation Article XXVIII places on core political speech. [18] In fact, as *Bond* holds, 385 U.S. at 135, the state has "no interest" at all in limiting legislators' very capacity to speak with their constituents.

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17 *See Eu* v. *San Francisco Democratic Comm.*, 489 U.S. 214, 223 (1989) ("Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (quoting *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971)).

18 This Court's cases are clear that provisions like Article XXVIII that seek to limit speech in the course of an election campaign are subject to strict scrutiny under the First Amendment. *See Colorado Republican Federal Campaign Comm.*, 64 U.S.L.W. at 4666 (plurality opinion); *Brown* v. *Hartlage*, 456 U.S. at 53-54 ("When a state seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression."); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 & n. 11 (1978); *Buckley* v. *Valeo*, 424 U.S. at 44-45.



Nevertheless, Petitioners assert that Article XXVIII promotes the governmental interest in encouraging all citizens to learn English. Pet. Brief at 17-18. *Amici* support that interest. But they emphatically deny that that interest may be achieved by cutting off the First Amendment rights of legislators or cutting out a substantial part of the citizenry from participating in government. Such means are neither legitimate, nor narrowly tailored. Indeed, *amici*'s own experience shows that the best way to bring non-English-speakers into the "mainstream" is to involve them in the democratic process while they learn English, not shut them out of it until they are fluent. As this Court recently noted, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495, 1508 (1996); *see Anderson* v. *Celebreeze*, 460 U.S. 780, 798 (1983) ("[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism").

Petitioners also argue that the state has a "substantial" interest in promoting "national unity." Pet. Brief at 36-37. But the case Petitioners cite in support of this interest held that "promoting national unity" did *not* provide a compelling state interest for criminalizing speech with which the state disagreed. *See Texas* v. *Johnson*, 491 U.S. 397, 418 (1989). In fact, when the sentence quoted by Petitioners is read in context, it becomes clear that the true issue in *Johnson*, as well as in this case, is the *means* employed by the state in reaching its goal of national unity. 491 U.S. at 418 ("National unity as an end which officials may foster by persuasion and example is not in question. *The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.")* (emphasis added) (quoting *Board of Educ.* v. *Barnette*,

319 U.S. 624, 640 (1943)); *see Meyer* v. *Nebraska*, 262 U.S. at 401.

*Amici* agree that encouraging citizens to speak English is a good thing; they also agree that encouraging "national unity" can be a good thing. But the *means* chosen by Arizona to promote these goals unnecessarily and unconstitutionally limit core First Amendment rights of legislators to serve and communicate with their constituents.

*Amici* also agree with Petitioner's *amici* WLF that "[p]olitics requires deliberation, and deliberation requires that those deliberating understand each other." WLF Brief at 23. But from this statement, WLF and Petitioners draw the wrong conclusion. A legislator who is required to speak only in English will simply not be understood by that portion of his or her constituency that does not speak English. *Amici* likewise agree with WLF that "in a democracy, where the people are sovereign, and government is not the preserve of a favored few, but the purview and responsibility of the people as a whole . . . the people *as a whole* must be able to deliberate amongst themselves, and to deliberate, they must be able to communicate." *Id.* (emphasis added). But a provision like Article XXVIII that prevents legislators from speaking languages other than English with their constituents ensures that the people *as a whole* will be unable to communicate with their elected officials and therefore will be unable to participate in the political process in the most direct way possible.

Finally, *amici* agree with WLF that "for this nation to work, we must *all* be able to discuss our political heritage, the foundations of our rights, the nature of our duties, together." *Id.* at 26 (emphasis added). This discussion is impossible, however, if those who do not speak English are unable to participate in the debate. The First and Fourteenth Amendments preserve the right of all people in our Nation, *including* those who do not speak English, to be able to participate fully in discussions with their representatives on matters of



public policy, and preserve the rights of legislators to freely discuss with *all* of their constituents the matters necessary to effectively represent those constituents in Congress and in the state legislatures. Because a provision such as Article XXVIII violates these rights, it cannot withstand constitutional scrutiny and should be invalidated by this Court.

## II. THE LONG TRADITION OF NON-ENGLISH COMMUNICATIONS BETWEEN LEGISLATORS AND THEIR CONSTITUENTS CONFIRMS THE UNCONSTITUTIONALITY OF ARTICLE XXVIII

Although *amici*'s experience demonstrates the critical importance of legislators' ability to communicate freely with all their constituents -- even those who do not speak English -- *amici*'s experience is nothing new; government representatives have used languages other than English to communicate with their constituents since the very founding of our nation. This tradition of non-English communications by legislators provides the historical backdrop for the adoption of both the First and the Fourteenth Amendments, and shows that it was well understood by the legislators of these times that the practice of non-English communications by legislators was both necessary and appropriate to keep *all* the people informed about the workings of the government. [19]

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[19] In giving meaning to the terms of the First Amendment, this Court frequently informs its decisions with reference to the history of our nation at the time that the Constitution was adopted. *See Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 10 (1986) (First Amendment right of access to preliminary hearings informed by "tradition of accessibility"); *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 508 (1984) (First Amendment right of access to voir dire supported by fact that "[p]ublic jury selection . . . was the common practice in America when the Constitution was adopted."); *Globe Newspaper Co.* v. *Superior Court*, 456 U.S. 596, 604-05 (1982). As Justice Scalia recently noted, historical evidence from the states at the time the Fourteenth Amendment was

These historical materials also belie the conclusory arguments by Petitioners and Petitioners' *amici* WLF that the essence of our democracy relies upon prohibiting the use of languages other than English. *See* Pet. Brief at 36-38. Instead, the long-standing and continuing tradition of our nation is to permit legislators to communicate in languages other than English with portions of their constituencies that do not understand English. This tradition confirms and underscores *amici*'s own experience that it is only through such communications, which are given the greatest First Amendment protection, that *amici* and other legislators may successfully represent *all* of their constituents in our democratic process.

### A. The Continental Congress and Early State Legislatures Issued Official Documents in Languages Other Than English

The Continental Congress translated numerous of its official publications into German and French to communicate with non-English speaking inhabitants of the colonies. [20] During the Revolutionary War, the

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adopted is also important to the application of First Amendment principles to state laws. *See 44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. at 1515 (Scalia, J., concurring in part and concurring in the judgment) (relevant evidence provided by "the state legislative practices prevalent at the time the First Amendment was adopted . . . . [and] more relevant still are the state legislative practices at the time the Fourteenth Amendment was adopted, since it is most improbable that that adoption was meant to overturn any existing national consensus regarding free speech.").

20 For example, in 1774, the Continental Congress made available a German translation of excerpts from its votes and deliberations and a few years later, it ordered a French translation of the "Rules and Articles for the Better Government of the Troops Raised." *See 1 Journals of the Continental Congress, 1774-1789*, 135 (Worthington Chauncey Ford, ed., 1905); 3 *id.* at 512. In 1776, the Continental Congress translated an address to the people of Ireland into German. 3 *id.* at 513-14. A December 10, 1776 circular letter of the constituents of the Continental Congress was printed and distributed in German. Heinz Kloss, *The American*



Continental Congress communicated in German to persuade German-speaking residents of the colonies to fight with them against the British. [21] After the Revolutionary War, the Articles of Confederation were published by the Continental Congress in both German and French. [22] The Articles of War were also translated into French in an effort to encourage Quebec to join the new nation. [23] And although Congress declined a 1794 request to print German editions of Congressional laws, [24] the new government continued communicating with the people in languages other than English. For example, four years later, President John Adams's message of April 7, 1798, dealing with orders to and

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*Bilingual Tradition* 26 (1977). In addition, the Continental Congress on January 16, 1777 authorized the printing, at its own expense, of 1,000 German copies of an address of the Convention of New York, *7 Journals of the Continental Congress, supra*, at 42 (1907), and also issued an address "To the People in General, and Particularly to the Inhabitants of Pennsylvania" in English and German. 6 *id.* at 1126 (1906).

21 On August 14, 1776, the Continental Congress ordered the translation into German of a resolution encouraging foreigners to desert the British army and become citizens of any state. *Journals of Congress*, Wednesday, August 14, 1776 (Library of Congress Constitutional Congress Broadsides Collection no. 12). In 1777, the Continental Congress authorized 2,000 copies of a report about the behavior of the enemy armies printed in German. Kloss, *The American Bilingual Tradition, supra*, at 26. The Continental Congress also printed in German a declaration of April 23, 1778, concerning the treatment of American citizens or immigrants who joined the American side in the Revolution. *Id.*

22 *9 Journals of the Continental Congress, supra*, at 1088 (1907).

23 3 *id.* at 512. *See also* Dennis Baron, *The English Only Question* 87 (1990).

24 *See* Kloss, *The American Bilingual Tradition, supra*, at 28-29; Baron, *The English Only Question, supra*, at 88 (outlining Congressional activity and debates on the petition); Klaus Wust, *The Virginia Germans* 114 (1969).

communications from American diplomats in France, was translated into German. [25]

States have a tradition even stronger than that of the federal government of official non-English communications with constituents. States with large German, French, and Spanish populations have often issued official documents and legislative materials in these languages. Such actions occurred in the original states and in lands acquired from Spain, France, and Mexico throughout the eighteenth and nineteenth centuries. [26]

### B. The Framers of the Constitution Supported Political Discourse in Languages Other Than English

Although members of the Continental Congress recognized some of the same concerns raised by Petitioners today about the use of non-English languages, no attempt was made to prohibit non-English speech in the new nation. For example, during the Continental Congress, Benjamin Franklin expressed concern that the large German population would increasingly undermine Anglican dominance in Pennsylvania and he publicly complained of the increasing German influence in American society. [27]

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25 Kloss, *The American Bilingual Tradition, supra,* at 28.

26 *See id.*, at 112-15, 143-44, 189-90 (describing Louisiana laws translated into French and German, and Pennsylvania, Maryland and New York laws translated into German); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 317-18 (1992) (describing translation of California laws and legislative proceedings into Spanish); Wust, *The Virginia Germans, supra,* at 113-14 (describing Virginia laws translated into German in the 1700s).

27 *See* Baron, *The English Only Question, supra,* at 65-67; 2 Albert Bernhardt Faust, *The German Element in The United States* 152-55 (1927). In 1751, Franklin wrote to a friend of his fear that Pennsylvania would become a German colony, and criticized German-Americans for refusing to learn English. 4 Benjamin



Despite his concerns, Franklin did not attempt to limit the use of German in the new United States -- by government or by the people -- but instead published himself the first German newspaper in the United States, and also published German books. [28] In fact, Franklin opposed a proposal that would limit the printing and sale of German materials. [29]

Furthermore, Thomas Jefferson and other of the Founders strongly believed in the importance and cultivation of languages other than English. Jefferson, fluent in French, recognized the political advantage to be gained from studies of other languages, and his correspondence often commented on the importance to Americans of learning the French and Spanish languages. [30] Benjamin Rush, a signer of the Declaration of Independence, also publicly supported learning several languages. [31]

More importantly, not only did the Founders of the new nation fail to announce an official language, or to prohibit the speaking of languages other than English, they also rejected attempts to regulate "official" American English. In the 1780s, an effort to establish a national language academy to standardize American English failed, demonstrating the Founders' awareness of the lingual diversity of the new nation, and

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Franklin, *The Papers Of Benjamin Franklin* 120-21, 234 (Leonard W. Labaree, ed., 1961).

28 *See* generally, Oswald Seidensticker, *The First Century of German Printing in America 1728-1830* (1980) (listing German publications in America).

29 Baron, *The English Only Question, supra,* at 67.

30 *See* Perea, 77 Minn. L. Rev. at 289-90 (citing Thomas Jefferson, *Letter from Thomas Jefferson to Sir Herbert Croft* (Oct. 30, 1798), in *The Complete Jefferson* 855 n.1, 856 n.1 (Saul K. Padover, ed., 1943)).

31 *See* Perea, 77 Minn. L. Rev. at 290-92.

unwillingness to prohibit expression based on the language in which it occurred. [32]

None of this is to say that some form of an "official English" provision might not be debatable today. But it is to say that at the time of the First and Fourteenth Amendments' adoptions, the Framers of those Amendments certainly did not contemplate that they -- or any other legislator -- could be precluded from speaking whatever language they chose with those they represented.

### C. Individual Legislators and Candidates Have Long Communicated With Constituents and Voters In Languages Other Than English

Not only was communication by the government in languages other than English accepted at the time the First and Fourteenth Amendments were adopted, but our country also has a long history of lawmakers, public officials, and candidates using languages other than English to address non-English speaking voters in their native language in order to gain their votes and ensure communication between the government and all of its constituents. [33] For example, in Virginia, German-speaking candidates for public office were routinely successful against non-German speakers in portions of the state just after the Revolutionary War. [34] Well into the nineteenth century, non-German speaking politicians throughout Virginia recognized the disadvantages they

32 *See id.* at 295-303.

33 *See* Baron, *The English Only Question, supra,* at 87.

34 Wust, *The Virginia Germans, supra,* at 113. These candidates from the Shenandoah Valley and southwestern portion of Virginia included Abraham Keller, elected to the House of Delegates from 1784-85; Jacob Rinker, elected to the 1788 Virginia convention ratifying the United States Constitution; Peter Kinder, elected to the House of Delegates in 1794; and John Koontz, the first German Republican elected to the House of Delegates in 1797. *Id.* at 113-14.



faced, and turned to German speaking allies or used handbills printed in German to further their campaigns. [35]

Further examples of non-English campaigning are provided by several prominent German-Americans who campaigned for themselves and on behalf of others in German in a number of states during the nineteenth century. One such man was Carl Schurz who campaigned in both German and English in the 1856 Presidential campaign for John Freemont, [36] and in Abraham Lincoln's 1858 United States Senate campaign against Stephen A. Douglas. [37] In the 1860 Presidential race, Schurz again campaigned for Lincoln, addressing meetings of German-born voters in German in a number of states. [38] Schurz himself was elected to the United States Senate from Missouri in 1869, becoming the first German-born citizen elected to that body. [39]

Another prominent German politician from Illinois named Gustave Koerner campaigned for several Democratic Congressmen during the same period as Schurz. Koerner campaigned for Senators Stephen A. Douglas and Lyman Trumbull and Congressman James Shields during the 1840s and 1850s. [40] From 1850 to

35 *Id.* at 115-17. For example, Congressman John Smith of Frederick, Virginia kept in constant touch with German church leaders, depending on them to speak on his behalf to non-English speaking Germans. *Id.* at 117. William Staige Marye, a member of the Virginia General Assembly from Page County, taught himself German to court the votes of the large number of non-English speaking Germans in his district. *Id.*

36 Allen Nevins, *Introduction* to Carl Schurz, *The Autobiography of Carl Schurz* at vii (Wayne Andrews, ed., 1961).

37 *Id.* at 138.

38 *Id.* at 164.

39 2 Albert Bernhardt Faust, *The German Element in The United States, supra,* at 158.

40 *See* Gustave Koerner, *Memoirs of Gustave Koerner 1809 - 1896* 425-28, 444-68 (Thomas J. McCormick, ed., 1909). Koerner

1860, Koerner campaigned in German for Abraham Lincoln throughout the midwest.[41] Koerner himself was elected to the Illinois legislature and continued to communicate to his German-American constituents in their native language.[42]

Again, this history is important not because it commands us today to continue the tradition of permitting discourse by public officials in whatever language they choose. Rather, that history is important because (1) it refutes Petitioners' unsupported contention that our democracy can work only if we exclude non-English speakers from it; and (2) it demonstrates that Petitioners' conception of the First Amendment -- that it would permit suppression of non-English speech by legislators -- was foreign to those who wrote that Amendment.

In summary, this Court's cases, the country's history, and *amici*'s experience all confirm a fundamental proposition: the First Amendment and our democratic process cannot function if legislators are prohibited from communicating with certain of their constituents. Article XXVIII should therefore be deemed unconstitutional.

---

also gave speeches in German for various Illinois Democratic candidates throughout this period at all levels of government. *Id.* at 425-28.

41 *See* David Herbert Donald, *Lincoln* 242, 245, 249 (1995).

42 *See* Koerner, *Memoirs, supra*, at 468-90. For examples of other German-American politicians in the eighteenth and nineteenth centuries who often spoke in their native tongue to their constituents, *see* Faust, *The German Element in the United States, supra*, at 150-87.



## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,

*Petitioners,*

v.

STATE OF ARIZONA; MARIA-KELLY F. YNIGUEZ; JAIME GUTIERREZ; and ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF THE STATE OF NEW MEXICO AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS MARIA-KELLY F. YNIGUEZ AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING

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## INTEREST OF THE AMICUS CURIAE

The State of New Mexico is home to a substantial number of people who speak a language other than English. In 1990, 27.9% of the state's population, or over 388,000 people, spoke Spanish in their homes, and 5.7% of the population, or over 79,000 people, spoke a Native American language at home. 1990 Census of Population, *Social and Economic Characteristics, New Mexico*, Table 32 (Sept. 1993).[1] Four percent of the population, or approximately 56,000 people, did not speak English or did not speak it well. *Id.*

Because substantial numbers of New Mexican citizens speak languages other than English, the state government of New Mexico conducts its business in many and varied circumstances in languages other than English. Spanish is the other language used most frequently, although it is not the only other language used.

If article XXVIII of Arizona's Constitution ("Article 28", or the "English-only provision") is permissible, similar laws could be enacted by the federal government or by state or local government in New Mexico. Such laws would severely hamper the operation of government in New Mexico: state government uses languages other than English because this is the most effective and efficient way to carry out the state's statutory responsibilities and to serve the public.

Equally important, an English-only rule would undermine New Mexican citizens' access to government.

---

[1] The U.S. census counts persons five years and older with respect to its information on language.

It would erect a high barrier to government's broad array of services for individuals not proficient in English as well as to citizens' First Amendment right to petition the government for redress of grievances. Such a law would also prevent them from securing access in the future through the political process.

> [L]aws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

*Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996). While individuals who speak a language other than English have no general right to require the government to "speak" to them in their language, this class of citizens should not be singled out and prevented altogether from accessing government in their language.

The State of New Mexico has a strong interest in ensuring that its government operations continue unhampered and that its citizens who are not proficient in English are not frozen out of the workings of government by an English-only law.

## SUMMARY OF ARGUMENT

There is no rational relationship between Article 28 and the state interests petitioners contend are at stake. Petitioners claim that prohibiting government's use of



languages other than English will further the state's interests in promoting a common language, efficient and effective government, political unity and stability, and public confidence in government. The record, however, is devoid of facts that support this claim. Petitioners' bare allegation is "divorced from any factual context from which [one] could discern a relationship to legitimate state interests . . . ." *Romer*, 116 S. Ct. at 1629.

The experience of New Mexico, on the other hand, provides the Court with a factual context by which to gauge petitioners' claims. New Mexico government has a tradition and present day practice of acceptance and protection of the use of Spanish. Many people in New Mexico speak Spanish as well as other languages other than English, a greater percentage of the population, in fact, than in Arizona.

Though a substantial number of people in New Mexico continues to speak a language other than English, only a small minority does not speak English or does not speak it well. An English-only provision is therefore not rationally related to the promotion of the legitimate state goal of a common language.

New Mexico state government frequently conducts business in languages other than English. This practice does not interfere with the workings of government, but allows government to carry out its responsibilities more efficiently and effectively.

Finally, New Mexico's support for the use of other languages has not resulted in political disunity or a lack of public confidence in government. To the contrary, New Mexico is a cohesive political entity that flourishes with

the diversity of its languages and cultures. Communicating to citizens in their own languages makes for more responsive government and thereby increases public confidence in government.

The experience of New Mexico is that language diversity is positive for the political entity. An English-only regime cannot be justified on any of the grounds offered by petitioners.

## ARGUMENT

### I. PETITIONERS' CLAIMED JUSTIFICATIONS FOR THE ENGLISH-ONLY PROVISION MUST BE SCRUTINIZED WITHIN A FACTUAL CONTEXT

The English-only provision should be subjected to a heightened level of scrutiny by the Court, whether analyzed under First Amendment principles of free speech or under equal protection principles. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 16 (1976) ("laws directed at speech are subject to exacting scrutiny under the First Amendment); *Plyler v. Doe,* 457 U.S. 202, 216-17 (1982) (strict scrutiny applied under Equal Protection Clause when a classification is suspect or when a fundamental right is affected). Petitioners, on the other hand, argue that the standard for review is whether the English-only provision is arbitrary. Pet. Brief at 20.

Whatever level of scrutiny is applied, the Court's recent decision in *Romer v. Evans* makes clear that the Court – even under the most deferential standard – will



scrutinize the "factual context" that supports the justifications for a state law that singles out a certain class of citizens for disfavored treatment. *Romer,* 116 S. Ct. at 1627, 1628-29. When the Court reviews a law such as Article 28 – which singles out non-English speakers, prohibits them from seeking specific protection from the law, and raises the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected" – the Court will look to whether the law has "any identifiable legitimate purpose or discrete objective" or whether the law is "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests . . . ." *Id.* at 1628, 1629.

It is not sufficient, therefore, that petitioners simply put forth what all can agree is a legitimate state interest, such as the promotion of democracy, and claim – in the abstract – that prohibiting the use of languages other than English in government operations furthers that interest. There must be a *rational and factually-based relationship* between the English-only provision and the state interests proffered by petitioners.

Petitioners' claimed justifications for the English-only provision are that it would: (1) promote a common language, (2) promote efficiency and effectiveness in government, (3) promote political unity and stability, and (4) prevent a "garbled and distorted" message from government so that the public has confidence in government. *See, e.g.,* Pet. Brief at 15, 35-37, 39.

The record, as the Ninth Circuit found, is devoid of *any* evidence that the English-only provision would in fact further any of these interests. *Yniguez v. Arizonans for*

*Official English*, 69 F.3d 920, 945 (9th Cir. 1995) ("Arizonans for Official English offer us nothing more than 'assertion and conjecture to support its claim' that Article XXVIII's restrictions on speech would serve the alleged state interests") (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978)), *cert. granted*, 116 S. Ct. 1316 (1996). There is nothing in petitioners' brief that undermines the Ninth Circuit's conclusion.[2]

[2] The one fact from the record upon which petitioners rely is that Ms. Yniguez' supervisor did not understand the settlement agreements that Ms. Yniguez drafted in Spanish. Pet. Brief at 35-36. This single fact, in petitioners' view, supports the claimed justification relating to government efficiency and effectiveness. *Id.* at 36.

Petitioners, however, fail to mention that Ms. Yniguez' files contained an English translation of the settlement agreements. Yniguez Opp. to Cert. Pet., App. at 4. Indeed, petitioners make no claim that the supervisor's inability to read the Spanish documents interfered with the Arizona Department of Administration's operations. Petitioners are simply offended by the notion that the supervisor could not have understood the Spanish documents without the translations.

In any event, the State of Arizona acknowledged that Ms. Yniguez' use of Spanish contributed to the efficient operation of state government and that, in general, the use of a language other than English by state government employees to communicate with citizens who are not proficient in English enhances the efficient operation and administration of Arizona government. *Id.*, App. at 8 (Stmnt. of Stip. Facts, ¶¶ 15-17).



## II. NEW MEXICO'S EXPERIENCE DEMONSTRATES THAT THE ENGLISH-ONLY PROVISION IS UNRELATED TO ANY LEGITIMATE STATE INTEREST

Although petitioners present nothing by way of concrete example, New Mexico's experience with multilingualism and multiculturalism provides the Court with a factual context by which to gauge whether an English-only law would promote the state interests petitioners claim are at stake.

### A. New Mexico Has a Tradition and Present Day Practice of Acceptance and Protection of the Use of Spanish

#### 1. Spanish has been used in New Mexico for governmental purposes for nearly four hundred years

New Mexico was first fully explored by the Spanish in 1540 by Francisco Vásquez Coronado. *See* Herbert E. Bolton, *Coronado, Knight of the Pueblos and Plains* 112-354 (1949). At that time, the area's indigenous inhabitants spoke dialects from many linguistic branches, including Hopi, Keres, Piro, Tewa, Tiwa, Tompiro, Towa, Zuni and Athabascan (Navajo and Apache) tongues. Lyle Campbell & Marianne Mithun, *The Languages of Native America* 390-428, 874-76 (1979). After eight previous explorations by the Spanish, the first permanent Spanish settlement was established under Juan de Oñate in 1598. *See* Ralph Emerson Twitchell, *The Leading Facts of New Mexican History* 53-352 (1911). The Spanish continued to settle the

area during the 1600's. Edward H. Spicer, *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533-1960*, at 284-92 (1st ed. 4th prtg. 1972). In 1680, the Pueblo Indians rebelled and forced the Spanish out, but between 1692 and 1696, the Spanish reconquered. Heinz Kloss, *The American Bilingual Tradition* 125 (1972). Spanish became the language through which Native American tribes of different languages spoke to one another. Spicer, *supra*, at 435.

The first Anglo-Americans (persons of European non-Hispanic descent, commonly abbreviated in the southwestern United States as "Anglos") came to New Mexico in 1804. Kloss, *supra*, at 125. English usage increased as a result of greater commerce and the opening of the Santa Fe Trail in 1821. D.W. Meinig, *Southwest: Three Peoples in Geographical Change, 1600-1970*, at 17-19 (1971). In 1846, the United States acquired New Mexico's territory by military force. Kloss, *supra*, at 125. At that time, there were only about 100 English speaking settlers in the territory. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 320 (1992). The United States formally annexed the area which includes present day New Mexico in 1848 through the Treaty of Guadalupe Hidalgo; in a later act, Congress promised to grant equal political rights to the inhabitants of the territory "as soon as possible." Kloss, *supra*, at 125, 127.

In 1850, New Mexico's population of approximately 50,000 was overwhelmingly Spanish speaking. Robert Milk, *The Issue of Language in Education in Territorial New Mexico*, 7 Bilingual Review/Revista Bilingüe 212, 214



(1977). During the territorial years, the lawmaking process was American and Anglo-Saxon, a majority of legislators was Hispanic, and the leaders of both political parties included Anglo-American and Hispanic representatives. Jack E. Holmes, *Politics in New Mexico* 30 (1967). In 1864, for example, thirty-one of thirty-three members of the New Mexico territorial legislature were Hispanic. 17 Hubert Howe Bancroft, *The Works of Hubert Howe Bancroft: History of Arizona and New Mexico, 1530-1888*, at 706 (1889). In 1887, nineteen of thirty-three legislators were Hispanic. *Id.* at 709; *see also id.* at 706-07 (noting the "preponderance of Spanish names" in the New Mexican legislative assemblies between 1863 and 1887) & n.3.

Use of English in New Mexico for governmental purposes began when New Mexico became a United States territory, although Spanish continued as the dominant language. Spicer, *supra*, at 436. The laws of the territory were published on October 7, 1846 in a bilingual edition, with Spanish on one side of the page and English on the other. Perea, *supra*, at 320. Until 1870, New Mexico territorial laws were generally enacted in Spanish, translated into English and published in a bilingual volume. Jurig Fedynskyj, *State Session Laws in Non-English Languages: A Chapter of American Legal History*, 46 Ind. L.J. 463, 471 (1971); Perea, *supra*, at 320. After 1870, laws were enacted in English and, along with other official documents, translated in a separate volume into Spanish. Fedynskyj, *supra*, at 471; Perea, *supra*, at 321. Until the late 1880's, all business in the New Mexico territorial legislature was transacted in Spanish. Bancroft, *supra*, at 708-09; Eduardo Hernandez-Chavez, *Language Policy in the United States, in*

*Linguistic Human Rights: Overcoming Linguistic Discrimination* 141, 147 (1995).

The 1880's saw a great influx of Anglos to the region as a result of economic expansion and the arrival of the railroad. Doris L. Meyer, *The Language Issue in New Mexico, 1880-1900: Mexican-American Resistance Against Cultural Erosion*, 4 Bilingual Review/Revista Bilingüe 99, 100 (1980); Milk, *supra*, at 216. By 1885, there were an estimated 100,000 Spanish speaking inhabitants and 40,000 Anglo-Americans. Milk, *supra*, at 214.

Soon after the United States acquired New Mexico, efforts to secure statehood began. Bancroft, *supra*, at 720; Kloss, *supra*, at 127. Congress had a number of objections to New Mexico's entrance; principal among them was the predominance of citizens of Spanish descent "whose language was foreign." Bancroft, *supra*, at 720-21; Kloss, *supra*, at 127-28; Perea, *supra*, at 322 & n.295. Congress feared that New Mexico's citizens would not be sufficiently patriotic or respectful of principles of American government. Bancroft, *supra*, at 721; Marc Simmons, *New Mexico: A Bicentennial History* 133 (1977). As a result, for more than sixty years, the efforts of New Mexico to become a state were "checkmated." Simmons, *supra*, at 133.[3]

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[3] In 1889, during the Spanish-American War, President McKinley sent a telegram to the governor of New Mexico, Miguel A. Otero, Jr., requesting recruits. Simmons, *supra*, at 165. The Governor "knew he was on the spot," understanding that many eastern newspapers doubted New Mexico's loyalty to the United States and had written inflammatory articles that New Mexico was filled with Spanish sympathizers. *Id.*



Congress' fears about language began to subside with passage of the Fergusson Act in 1898, which established the foundation for a public school system in the territory. *Id.* at 166. In response to political pressure, Congress passed the Enabling Act of 1910, allowing New Mexico and Arizona to hold constitutional conventions and setting forth requirements to enter the union. *Id.* New Mexico convened a constitutional convention that same year. One half of the seventy Republican delegates to the one hundred member convention were Spanish American. Holmes, *supra*, at 40.

As a result of that representation, the New Mexico Constitution contained important guarantees of the rights of Spanish speakers and persons of Spanish descent. These rights included the right of all citizens to vote, hold office and sit on juries without regard to "religion, race, language or color, or inability to speak, read or write the English or Spanish languages . . . ." N.M. Const. art. VII, § 3.[4] At the end of the convention, Delegate Montoya offered the following:

> In the name of the Spanish-American members of the Convention, I wish to say, that all delegates here have, as one man, helped to safeguard the

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The Governor issued a call to every town in the territory. *Id.* The response was substantial, from both Hispanic and Anglo citizens, such that Theodore Roosevelt would later claim that half the officers and men in his Rough Riders Regiment came from New Mexico. *Id.*

[4] Other provisions in the New Mexico Constitution which protect the use of Spanish or prohibit discrimination against persons of Spanish descent are discussed *infra*. The pertinent parts of these six constitutional provisions are set forth in the Appendix.

> rights of the two hundred thousand people of that blood in this Territory, as loyal a people as is to be found in any State of the Union.

*Proceedings of the Constitutional Convention of the Proposed State of New Mexico* 289 (Press of the Morning Journal 1910).

Congress' concern, however, about New Mexico's inhabitants and their use of Spanish had not altogether disappeared. In the Enabling Act, Congress required that all state officers and members of the legislature "read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter . . . ." Holmes, *supra*, at 52. The drafters of the New Mexico Constitution set forth (in article XXI) the English language qualification to satisfy Congress' requirement despite the inconsistency with article VII's right to hold office without regard to the ability to speak, read or write in English or Spanish. Holmes, *supra*, at 52.

In 1911, this Court held that Congress could not place conditions on newly admitted states which deprived them of any "powers of sovereignty and jurisdiction which pertain[ed] to the original States." *Coyle v. Smith*, 221 U.S. 559, 573 (1911). In turn, Congress removed the English language restriction in the Enabling Act, and the New Mexico legislature proposed an amendment removing it from the constitution. Holmes, *supra*, at 54-55. The state constitution, including the amendment removing the English language qualification for office holders, was adopted in 1911.[5] Holmes, *supra*, at 54-55; Perea, *supra*, at

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[5] Arizona retained the English language qualification in its constitution. Ariz. Const. art. XX, ¶ 8.



322. On January 6, 1912, New Mexico became the forty-seventh state.

The New Mexico Constitution guaranteed that all laws would be published in Spanish for twenty years and thereafter in Spanish at the discretion of the legislature. N.M. Const. art. XXII, § 14. The twenty year limit was extended by ten years in 1931 and again in 1943, although the last annual edition of the state laws in Spanish was published in 1949. Kloss, *supra*, at 130-31; Fedynskyj, *supra*, at 471.

With an increasing number of Anglo-Americans moving into the state, Spanish inevitably gave way to English as the dominant language. Hernandez-Chavez, *supra*, at 147. Spanish was not retained as the official language of the legislature, and the legislature employed a permanent interpreter for the last time in 1935 although nineteen of the forty-two representatives had Spanish surnames. Kloss, *supra*, at 131.[6]

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[6] While New Mexico has a history of bilingualism, the coexistence of three major ethnic groups and their linguistic differences has not been without tension. Meinig, *supra*, at 62-64, 90, 92. Language policy in education in territorial New Mexico and into statehood represents one such area of tension between Spanish speakers and Anglo-Americans. *See generally* Kloss, *supra*, at 134-39; Meyer, *supra*, at 100-04; Milk, *supra*, at 212-19.

In 1856, the territorial governor introduced a law to establish a public education system in New Mexico. Milk, *supra*, at 212. The law was defeated overwhelmingly, 5016 votes to 37. *Id.* This vote was viewed by Anglos as evidence that the Spanish speaking population was completely hostile to education. *Id.* at 212, 215.

From researching Spanish language newspapers of the day, however, some later scholars believe that Spanish speaking New Mexicans saw public education, in which English

## 2. Many laws in New Mexico protect or require the use of the Spanish language

New Mexico has not only a historical but also a present day practice of protecting or requiring the use of

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inevitably would be the language of instruction, as an attempt by Anglo-Americans to dominate and overcome their language and culture. Milk, *supra*, at 214.

In 1891, a public school law was passed; an administrative ruling that same year from the Superintendent of Public Instruction called for English to be the sole language of instruction. *Id.* Again, the law was opposed by some Spanish newspapers – even though they recognized that knowledge of English was essential for practical purposes – because they believed it would lead to an erosion of the Spanish language and cultural values. Meyer, *supra*, at 100; Milk, *supra*, at 216.

> What seemed to upset the editors of the newspapers . . . was the tendency for the language issue to be seen in an either-or framework – either Spanish had to be totally abandoned in the schools or English would never be adequately learned by the children from Spanish-speaking homes.

Milk, *supra*, at 216. The editors' concern was founded: between 1900 and 1910 there was "almost a complete removal of Spanish from the schools." Kloss, *supra*, at 135.

Education was used by the federal government to remove Native American languages. Native American children, including those in New Mexico, were separated from their parents, sometimes by force, and taken to federal boarding schools where they were required to speak only English. Spicer, *supra*, at 439. An 1887 policy of the Commissioner of Indian Affairs stated: " 'It is . . . believed that teaching an Indian youth in his own barbarous dialect is a positive detriment to him. The impracticability, if not impossibility of civilizing Indians of this country in any other tongue than our own would seem obvious.' " *Id.*



Spanish through its laws.[7] The New Mexico Constitution contains six provisions which protect or require the use of Spanish or protect Spanish speaking people or people of Spanish descent from discrimination. *See* N.M. Const. art. VII, § 3; art. XII, §§ 8, 10; art. XIX, § 1; art. XX, § 12; art. XXII, § 14 (set forth in the Appendix). Perhaps most important is the provision, referred to previously, providing that:

> The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, *language* or color, *or inability to speak, read or write the English or Spanish languages* . . . .

*Id.* art. VII, § 3 (emphasis added).

The constitution required the ballots for ratification to be printed in both English and Spanish. *Id.* art. XXII, § 14. To this day, the constitution requires that any proposed constitutional amendment be published in a newspaper in every county and, if a Spanish language newspaper is available, the proposed amendment must be published in both English and Spanish. *Id.* art. XIX, § 1.

The state constitution has certain protections for Spanish speaking students: it requires the legislature to provide training for teachers so that they may become proficient in both English and Spanish, *id.* art. XII, § 8, and protects the rights of children of Spanish descent to attend any public school and "forever enjoy perfect

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[7] *See* Kloss, *supra*, at 129-39, for a historical discussion of New Mexico laws in which Spanish was required or permitted.

equality with other children in all public schools," *id.* § 10.[8]

In addition to the constitutional protections, New Mexico law has a history of providing election information and notices in Spanish. *See* Hernandez-Chavez, *supra*, at 151. Many of the laws relating to bilingual election requirements were enacted in 1969, prior to enactment of bilingual requirements under the 1975 Amendments to the Federal Voting Rights Act. *See, e.g.*, 1969 N.M. Laws 240, §§ 101, 164, 213, 378. These laws included provisions for publication of election proclamations in Spanish as well as English. *See also* 1967 N.M. Laws 16, § 230 (providing that "[a]ll publications, ballots, ballot labels, and instructions for a [school district] bond election shall be printed in English and may also be printed in Spanish"). Currently, New Mexico has at least nineteen statutory provisions that require election materials or information to be printed in both English and

[8] The constitution reflects the historical tension between Spanish speakers and Anglos in the area of education, providing that instruction in public schools "shall always be conducted in English." N.M. Const. art. XXI, § 4.

New Mexico's Bilingual Multicultural Education Act, however, requires that state funded bilingual education programs use "two languages as mediums of instruction." NMSA 1978, § 22-23-6 (Repl. Pamp. 1993). The purposes of the act are to ensure equal education opportunities in New Mexico, to improve students' linguistic skills, to incorporate students' linguistic and cultural backgrounds into the curriculum, and to "teach[ ] students to appreciate the value and beauty of different languages and cultures." *Id.* § 22-23-3.



Spanish (including those provisions enacted to comply with the federal voting laws).[9]

New Mexico laws regularly promote or require the use of Spanish in the publication of legal notices. There are at least eighteen statutes currently in effect which either require or permit publication of notices in Spanish in addition to English.[10] These statutory provisions range from requiring local governments to publish notice of their proceedings in English or Spanish, or both, depending on the portion of the local population who speaks English, NMSA 1978, § 14-11-11 (Repl. Pamp. 1995), to requiring that notices of judicial sales be published in Spanish or English, whichever will give the most extensive notice in the county where the sale will take place, *id.* § 39-5-1 (Repl. Pamp. 1991),[11] to providing that applicants

[9] *See* NMSA 1978, §§ 1-1-14, 1-2-3(B), 1-2-3.1, 1-2-19(A), 1-4-5(C)(2), 1-4-5.1(H), 1-8-15, 1-10-10(A), 1-11-3(E), 1-16-5(A), 1-16-7, 1-16-13, 1-22-4(A), 1-22-5(A) (Repl. Pamp. 1995), 3-8-17(A)(1), 3-8-22(A) (Repl. Pamp. 1995), 21-13-18.1(A) (Repl. Pamp. 1996), 22-18-3(C) (Repl. Pamp. 1993), 49-2-4.

[10] *See* NMSA 1978, §§ 14-11-11, 14-11-12 (Repl. Pamp. 1995), 17-4-6(A) (Repl. Pamp. 1995), 39-5-1 (Repl. Pamp. 1991), 47-6-17(D) (Repl. Pamp. 1995), 49-2-18, 69-36-7(K)(3) (Repl. Pamp. 1993), 73-8-3, 73-9-3, 73-10-4, 73-11-14, 73-11-29, 73-14-3(F), 73-18-20(C), 74-9-22(C) (Repl. Pamp. 1993), 77-9-20(A) (Repl. Pamp. 1993), 77-12-4 (Repl. Pamp. 1993), 77-14-10 (Repl. Pamp. 1993).

[11] During the nineteenth century, lack of notice of judicial sales in Spanish had severe consequences for certain Spanish speaking land owners in New Mexico. Many Hispanic families claimed land grants from Spain and Mexico. *See* Malcolm Ebright, *Land Grants and Lawsuits in Northern New Mexico* 22-28 (1994). In one fraud scheme, selected claimants, backed by speculators, would sue to partition their grants of land. *Id.* at

for mining permits publish notice of their applications in English and Spanish, *id.* § 69-36-7(K)(3) (Repl. Pamp. 1993); 19 NMAC 10.2.903.C. State statute designates seven newspapers as official Spanish language newspapers for publication of notices in Spanish. NMSA 1978, § 14-11-13 (Repl. Pamp. 1995).

Two licensing statutes permit applicants to take their licensing examinations in Spanish. NMSA 1978, § 59A-11-6(C) (Repl. Pamp. 1995) (examination for insurance agents); *id.* § 60-13-16(B) (Repl. Pamp. 1989) (examination for construction industries).

Spanish speaking consumers have certain protections: utility companies must deliver notices in English and Spanish to customers whose services are being discontinued, NMSA 1978, § 27-6-17(A)(1) (Repl. Pamp.

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152. The scheme's claimants would certify that they did not know the names of the other grantees and would publish notice of the partition to "unknown heirs" in English newspapers – even though the other grantees typically were Spanish speaking. *Id.* at 156. 254. The court would then order sale of the land, although most of the grantees had no notice and had not participated in the legal proceedings. *Id.* at 156. The sales would be attended by one or a few bidders, usually representatives of the speculators, who would pay substantially less for the land than it was worth. *See, e.g., id.* at 154. The New Mexico Supreme Court ended these practices in *Priest v. Bd. of Trustees of Las Vegas*, 16 N.M. 692, 698-99, 120 P. 894, 896 (1911) (where real owner may be served by name, owner's property cannot be taken by publication of notice to "unknown claimants"), *aff'd*, 232 U.S. 604 (1914) and *Rodriguez v. La Cueva Ranch Co.*, 17 N.M. 246, 257-58, 134 P. 228, 231-32 (1912) (when parties to partition proceeding have actual knowledge of or means of obtaining identity of adverse claimants, proceedings against adverse claimants as "unknown owners" are a nullity).



1995), and liquor license holders must post warnings in English and Spanish that drinking alcohol while pregnant may cause birth defects, NMSA 1978, § 60-6A-30 (Repl. Pamp. 1994).

New Mexico has a Spanish language state song, a Spanish language salute to the flag, and a state poem written in Spanish and translated into English. NMSA 1978, §§ 12-3-6, 12-3-7 (Repl. Pamp. 1988), 12-3-11 (Cum. Supp. 1996). The legislature has called the flag *"el símbolo zia de amistad perfecta, entre culturas unidas."*[12] NMSA 1978, § 12-3-7 (Repl. Pamp. 1988).

During the 1987 legislative session, a resolution proposing an amendment to the constitution to make English the official language of the state was introduced. H.J. Res. 7, 38th N.M. Legis., 1st Sess. (1987). The proposed resolution was never voted out of committee. In 1989, the legislature adopted a memorial affirming that

> the people of New Mexico promote the spirit of diversity-with-harmony represented by the various cultures that make up the fabric of our state and American society . . . .

H.J. Mem. 16, "Supporting Language Rights in America," 39th N.M. Legis., 1st Sess. (1989). The memorial affirmed the importance of learning English, supported the "preservation of the cultures and languages," and encouraged proficiency in English and other languages. *Id.*

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12 "[T]he Zia symbol of perfect friendship between united cultures." NMSA 1978, § 12-3-3 (Repl. Pamp. 1988). The Zia is the symbol on New Mexico's flag and is taken from an ancient sun design from the Zia Pueblo. Office of the New Mexico Secretary of State, *New Mexico Blue Book 1995-96*, at 38 (1995).

### 3. New Mexico state government regularly "speaks" languages other than English during the course of business

The present day state government of New Mexico conducts business in languages other than English under all sorts of circumstances. The Attorney General and his Office, for example, use other languages daily. The Attorney General receives many calls from constituents who speak Spanish. The Attorney General's staff speaks in Spanish to all constituents who prefer to communicate in Spanish.[13]

Spanish language television stations ask the Attorney General's Office to discuss important public issues. Representatives from the Office speak Spanish directly because it is the more effective way to communicate with the public.

The Consumer Division of the Office of the Attorney General receives complaints daily from consumers who speak Spanish. To facilitate accepting and responding to these complaints, the division employs three advocates who speak Spanish fluently. The Attorney General's Consumer Alert Line, which receives thousands of inquiries and complaints annually, is available to Spanish speakers. To assist consumers from the Navajo Nation, who are

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[13] Prohibiting the Attorney General from expressing his views to his constituents and to the electorate in the manner and language of his choice would strike at the core of the Attorney General's First Amendment right of free speech. *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966).



victims of fraud in disproportionate numbers, the division is developing a consumer education program in Navajo.

Recently, the Consumer Division investigated a fraudulent long distance telephone carrier scheme in which the carrier improperly recruited new customers. The carrier, which generally charges higher rates than other carriers, targeted hundreds of Vietnamese and Spanish speaking individuals in New Mexico. To gather information from the victims, the Attorney General's Office hired a Vietnamese interpreter and used Spanish speaking employees to translate.

The Attorney General's Office recently investigated a complaint of election fraud in which four or five Mexican national hotel maids were used to falsify thousands of signatures on nominating petitions. Some of the women spoke little or no English; Spanish speaking investigators interviewed the women to obtain information about the fraud.[14]

The Attorney General participates annually in an international border conference with state attorneys general from Mexico and the United States (including the Attorney General of Arizona) to discuss common border problems. The conferences are bilingual; the proclamation

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[14] Whether this example would fall within Article 28's exception allowing the use of a language other than English to protect the rights of criminal defendants and victims of a crime is not clear. See Ariz. Const. art. XXVIII, § 3(2)(e). The parameters of the exceptions to Article 28 would generate a spate of litigation.

issued and signed at the end of each conference is written in English and Spanish.

Examples from other state agencies abound. The Secretary of State's Office, which oversees elections, NMSA 1978, §§ 1-2-1 to 1-2-2 (Repl. Pamp. 1995), provides a multitude of election materials to voters in Spanish and Native American languages. Secretary of State employees provide election information by telephone and in person in Spanish and Native American languages.

The Human Rights Division, which oversees employment discrimination complaints, NMSA 1978, § 28-1-4(B) (Repl. Pamp. 1996), employs intake officers who accept complaints and interview complainants in Spanish. Hearings before the Human Rights Commission are translated, at Commission expense, from Spanish to English when a party or witness is Spanish speaking. On occasion, Spanish speaking members of the Commission question witnesses in Spanish because it is a more effective way to communicate (and an English translation follows).

The New Mexico State Library has staff regularly available to assist Spanish speaking patrons. Under Arizona's English-only provision, even the sign on the library's reception desk, which reads *"Personal en español disponible,"*[15] would be illegal.

Inspectors from the state Livestock Board inspect livestock waiting to be shipped for ownership and brand, and check the bills of sale. NMSA 1978, § 77-2-7(A) (Cum. Supp. 1995). Livestock inspectors routinely interact with

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[15] Spanish speaking staff available.



livestock owners who speak Spanish and conduct inspections in Spanish (although the certificates of inspection are issued in English). In the Gallup, New Mexico area, near the Navajo reservation, a state livestock inspector speaks Navajo to Navajo ranchers.

The state employees' retirement organization, the Public Employees Retirement Association ("PERA"), NMSA 1978, §§ 10-11-130 to 10-11-131 (Repl. Pamp. 1995), offers counseling on retirement and disability benefits in Spanish. PERA soon will introduce an interactive voice response system that will allow its members to vote via telephone, in English or Spanish, for members of the board which oversees the retirement association.

All of these activities, which are but a few of the countless instances in which languages other than English are used in the course of state government business, would be barred under an English-only regime like Article 28's.

### B. New Mexico's Experience with the Use of Spanish and Other Languages Shows That, as a Practical Matter, an English-Only Provision Bears No Relationship to Any Legitimate State Interest

New Mexico has a Spanish and English tradition that continues today. New Mexico law allows for the use of Spanish and other languages and, under certain circumstances, requires the use of Spanish. New Mexico government conducts business in languages other than English in many and varied circumstances. And New Mexico's multilingual population is proportionately larger than

Arizona's. [16] Yet none of the fears on which Article 28 is based has come to pass in New Mexico.[17]

First, New Mexico's protection of other languages, principally Spanish, has not led to a lack of common language in English. Only 4% of the population, a tiny minority of New Mexicans, do not speak English at all or

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[16] In 1990, 64.5% of New Mexico's population spoke English at home, 27.9% of the population spoke Spanish at home, and 5.7% spoke a Native American language at home. 1990 Census of Population, *Social and Economic Characteristics, New Mexico*, Table 32 (Sept. 1993). Ninety-six percent of the population spoke English only or, if multilingual, spoke English well; 4.0% of the population did not speak English or did not speak it well. *Id.*

In Arizona in 1990, 79.2% of the population spoke English at home, 14.2% spoke Spanish, and 3.3% a Native American language. 1990 Census of Population, *Social and Economic Characteristics, Arizona*, Table 32 (Sept. 1993). Ninety-six and four-tenths percent of the population spoke only English or, if multilingual, spoke English well; only 3.6% did not speak English or did not speak it well. *Id.*

[17] New Mexico, by its example, does not mean to imply that Arizona or any other state should promote or require the use of other languages in the same manner and to the same extent as New Mexico. Nor does New Mexico mean to imply that it has done all that it can or should to provide government access to those not proficient in English.

New Mexico's point is that, by its example, it can demonstrate as a matter of fact, rather than abstract surmise, that protecting the use of languages other than English – and allowing their use as part of government business – does not hamper or interfere with the state interests petitioners claim are at stake.



do not speak it well. In fact, in recent years, the proportion of people who speak English has increased and the proportion of people who do not speak English has decreased, even though a larger proportion of the population is foreign born.[18] New Mexico's experience demonstrates that protection of Spanish and state government's use of languages other than English have not resulted in lack of a common language or in the decline in the use of English; without prohibitions by the government on the use of other languages, use of English is widespread and is becoming more common.

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[18] In the 1970 census, 53.9% of New Mexico's population identified English as their "mother tongue," while 32.4% of the population identified Spanish as their "mother tongue." 1970 Census of Population, *Detailed Characteristics, New Mexico*, Table 142 (June 1972). Two and two-tenths percent of the population was foreign born. 1970 Census of Population, *General Social and Economic Characteristics, New Mexico*, Table 49 (Dec. 1971).

By the next census, in 1980, the percentage of New Mexico's population that was foreign born increased to 4.0%. 1980 Census of Population, *General Social and Economic Characteristics, New Mexico*, Table 63 (June 1983). Sixty-two and two-tenths percent of the population spoke English at home and 29.6% spoke Spanish at home. *Id.* Ninety-five and six-tenths percent spoke English only or, if multilingual, spoke English well. *Id.* Four and four-tenths percent did not speak English at all or did not speak it well. *Id.*

In 1990, 5.3% of the state's population was foreign born. 1990 Census of Population, *Social and Economic Characteristics, New Mexico*, Table 32 (Sept. 1993). Sixty-four and five-tenths percent of the population spoke English at home, and 27.9% spoke Spanish at home. *Id.* The percentage of people who spoke English only or, if multilingual, spoke English well, increased slightly to 96.0%, and the percentage who did not speak English or did not speak it well decreased to 4.0%. *Id.*

Second, the use of languages other than English in state government plainly makes government more effective and efficient. From solving consumer problems to providing election information to conducting legal proceedings in employment discrimination matters, state government in New Mexico chooses to communicate in languages other than English because such communication enables government to better accomplish its goals. Prohibiting the use of other languages is particularly unreasonable when government can communicate in other languages using existing resources.[19]

Finally, New Mexico enjoys public confidence in state government as well as political unity and stability. Accommodating other languages increases, rather than undermines, public confidence that government is truly responsive and serves its constituents. Many of the laws which require the use of Spanish in addition to English allow Spanish speakers to receive notice of important events in their communities and to participate more easily in elections. These laws promote political cohesion by allowing greater participation in civic life and in the electoral process.

In fact, Hispanics in New Mexico, as a proxy for Spanish speaking persons, have a long and unique history – which continues today – of active involvement and

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[19] Petitioners cannot seriously question that using languages other than English makes for more efficient and effective government in light of the State of Arizona's acknowledgement that this is the case. Yniguez Opp. to Cert. Pet., App. at 8 (Stmnt. of Stip. Facts, ¶¶ 15-17).



leadership in political affairs.[20] Presently, of the one hundred and twelve members in the 1995-96 New Mexico legislature, forty are Hispanics, six are Native Americans and two are African Americans. *New Mexico Blue Book, supra*, at 98.[21]

New Mexico does not suffer from the political divisiveness that petitioners fear arises from the use of languages other than English:

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[20] *See* Maurilio E. Vigil, *The Hispanics of New Mexico: Essays on History and Culture* 21 (1985) (New Mexico has historically been distinguished as a state where Hispanics were quite active in political affairs and where Hispanic office holders were commonplace); F. Chris Garcia & Rudolf O. de la Garza, *The Chicano Political Experience: Three Perspectives* 93-94 (1977) (Chicanos in New Mexico have long used the electoral process successfully); Meinig, *supra*, at 90 (noting "very high level of political participation" and "capable political leadership" of Hispanics in Northern New Mexico); Maurilio E. Vigil *et al.*, *New Mexico Government and Politics* 10 (1995) (Hispanic population has an active voice and involvement in political affairs which is unique from other southwestern states); Holmes, *supra*, at 19-20 (Spanish Americans in New Mexico historically have had a high level of voting compared to Spanish Americans in Arizona, Texas and Colorado) & 58 (noting high level of Hispanic voting in Albuquerque in 1962 elections); E.B. Fincher, *The Mexican American: Spanish Americans as a Political Factor in New Mexico 1912-1950*, at 122 (1950) (noting high level of Hispanic voting in New Mexico in 1940).

[21] The U.S. Bureau of the Census estimated that, in the 1994 elections, 37.2% of the voting age population (eighteen years and older) in New Mexico was Hispanic, 7.7% Native American, and 1.9% African American. Lynne M. Casper, U.S. Dept. of Commerce, *Projections of the Voting-Age Population, for States: November 1994* (May 1994); Bureau of the Census, U.S. Dept. of Commerce, *State Population Projections, Series A* (Mar. 1994).

Because of the relatively large proportion of distinctive ethnic groups in the state, and because of these cultures' long history in the area, ethnic relations have probably been closer to the model of cultural pluralism than those found in any other part of the country. While there have been hostilities, various instances of discrimination, and some antagonisms between the cultures, by and large New Mexico has as good a record of peaceful relations between ethnic groups as any other state. New Mexico prides itself on its multicultural conditions. Rather than strive toward a "melting pot," in which all cultural distinctions are mixed, the state seeks to maintain a cultural mosaic: each piece separate and distinct, but when placed side by side with other individual pieces, forming an integrated, composite whole.

F. Chris Garcia, *New Mexico: The Setting, in New Mexico Government* 1, 3-4 (footnote omitted) (Paul L. Hain *et al.* eds., 3d ed. 1994); *see also* Nancie L. González, *The Spanish Americans of New Mexico* 194 (2d ed. 1969) (New Mexico "comes closer to the pluralistic dream of society than does any other area in the nation").

Although petitioners believe that Arizona must "protect[ ] itself and [its] society from the divisive effects" of what it calls "official multilingualism," Pet. Brief at 36, New Mexico's experience demonstrates that petitioners have nothing to fear from government's reasonable use of languages other than English. Rather,

> [w]here people of different [linguistic and] cultural legacies exist side by side, they can be knitted into a common national loyalty if their [linguistic and] cultural traditions are treated with respect, so that loyalty to each ethnic group becomes a basis for loyalty to the larger society.



Ithiel de Sola Pool, *Plural Society in the Southwest: A Comparative Perspective, in Plural Society in the Southwest* 321, 328 (Edward H. Spicer & Raymond H. Thompson eds., 1972).

## CONCLUSION

The Court should affirm the opinion of the Ninth Circuit Court of Appeals in *Yniguez v. Arizonans for Official English*, 69 F.3d 920.

July 25, 1996

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## APPENDIX

The following are pertinent parts of the New Mexico Constitution that promote or require the use of Spanish or prohibit discrimination against Spanish speakers or persons of Spanish descent:

> The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages except as may be otherwise provided in this constitution; and the provisions of this section . . . shall never be amended except upon a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state, and at least two-thirds of those voting in each county of the state, shall vote for such amendment.

N.M. Const. art. VII, § 3.

> The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.

*Id.* art. XII, § 8.

> Children of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the

> public schools or other public educational institutions of the state, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the state, and the legislature shall provide penalties for the violation of this section. This section shall never be amended except upon a vote of the people of this state, in an election in which at least three-fourths of the electors voting in the whole state and at least two-thirds of those voting in each county in the state shall vote for such amendment.

*Id.* art. XII, § 10.

> Any amendment or amendments to this constitution may be proposed in either house of the legislature at any regular session thereof. . . .
>
> The secretary of state shall cause any such amendment or amendments to be published in at least one newspaper in every county of the state, where a newspaper is published once each week, for four consecutive weeks, in English and Spanish when newspapers in both of said languages are published in such counties. . . .

*Id.* art. XIX, § 1.

> For the first twenty years after this constitution goes into effect all laws passed by the legislature shall be published in both the English and Spanish languages and thereafter such publication shall be made as the legislature may provide.

*Id.* art. XX, § 12.

> The ballots cast at said election in favor of the ratification of this constitution shall have



> printed or written thereon in both English and Spanish the words "For the Constitution"; and those against the ratification of the constitution shall have written or printed thereon in both English and Spanish the words "Against the Constitution"; and shall be counted and returned accordingly.

*Id.* art. XXII, § 14.

However, the constitution, as originally enacted and as it continues today, provides that:

> Provision shall be made for the establishment and maintenance of a system of public schools which . . . shall always be conducted in English.

*Id.* art. XXI, § 4.

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Supreme Court, U.S.
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No. 95-974

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH
AND ROBERT D. PARK,
*Petitioners,*

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ;
JAIME P. GUTIERREZ; AND ARIZONANS AGAINST
CONSTITUTIONAL TAMPERING,
*Respondents.*

On Writ Of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL COUNCIL OF LA RAZA,
SVEDA, INC., ET AL., AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS
(Additional Amici Listed on Inside Covers)

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## STATEMENT OF INTERESTS OF AMICI CURIAE

This brief *amici curiae* is submitted on behalf of numerous community-based organizations ("CBOs") that provide assistance and support services to persons with limited or no English-speaking ability.[1] The *amici* CBOs, in a time of declining budgets and resources, attempt to provide a broad spectrum of services including health care, business and community development, educational programs, counseling, and employment assistance.[2] CBOs also inform their clients of their rights and obligations under federal and state law. CBOs thus not only assist persons with their immediate needs but also serve as a conduit between federal, state, and local governments and their non-English-speaking constituents by providing information about government and its services.

The approximately 7 million people in the United States with limited or no proficiency in English[3] constitute one of *amici* CBOs' principal constituencies. In Arizona alone, 21% of the population over the age of 5 speaks languages other than English at home, including Spanish (14%), German (.6%), Vietnamese (.1%), and several Native American languages

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[1] Pursuant to Sup. Ct. R. 37.3, the parties' letters of consent to the filing of this brief have been filed with the Clerk.

[2] The *amici* CBOs, including those based in Arizona, and the programs that they provide are described in the Appendix.

[3] *See* Letter from Rosalind R. Bruno, Education and Social Stratification Branch, Bureau of the Census, to Karen Hanson, Nat'l Council of La Raza 1 (Nov. 27, 1995) (on file with counsel for *amici*). Throughout this brief, the terms "limited English" and "non-English" speakers are used interchangeably to refer to persons with limited and/or no proficiency in English.

(3%).[4] Of these Arizonans, 122,423 (4% of the State's population) have limited or no proficiency in English.[5] These limited English-speaking groups have more difficulty accessing government assistance and information than English-proficient groups.[6] *Amici* CBOs are concerned that coercive English-only laws, such as Article XXVIII of the Arizona Constitution ("Article XXVIII"), will further isolate these constituents from their government and the democratic process.

Many persons in the United States with limited English proficiency are recent immigrants in search of economic prosperity and participation in a democratic society. Because they have an incentive to learn English to attain these goals,

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[4] *See* Bureau of the Census, U.S. Dep't of Commerce, *1990 Census of Population - Social and Economic Characteristics (Arizona)*, Table 18 (1993). These percentages are derived from the responses to question 15(a) of the 1990 Census Form, "Does this person speak a language other than English at home?" *See id.* at App. B-23-24, E-14.

[5] *See id.*, Table 18. This percentage is derived from responses to question 15(c) of the 1990 Census Form, "How well does this person speak English?" For purposes of this brief, persons are considered to be limited or non-English proficient if they responded "not well" or "not at all" (as opposed to "very well" or "well") to question 15(c). *Id.* at App. B-24-25, E-14.

[6] One study has shown that families with limited or non-English-speaking heads of household received their welfare checks nearly a week later than English-speaking clients; incurred greater incidental costs in receiving the benefits, such as making extra trips to welfare offices, paying for interpreters, and losing wages due to increased time at the social service agency; and received no information concerning additional sources of assistance such as free legal, educational, or day care assistance. Office of Civil Rights, U.S. Dep't of H.E.W., *Access of Non- or Limited-English Speaking Persons of Hispanic Origin to the N.Y.C. Dep't of Social Services* (1979), *discussed in* Bill Piatt *¿Only English?* 105-06 (1990).



many communities of non-English speakers constitute groups in transition to English proficiency. Non-English-speaking immigrants generally learn English quickly after arriving in the United States,[7] and use English as their primary or sole language within two or three generations.[8] However, because there is a constant influx of immigrants to the United States,[9] and because discrimination against and inadequate education of language minorities persist,[10] there will always be a need to provide information about government and government services in languages in addition to English.

*Amici* have witnessed first-hand the difficulties faced by persons with limited English proficiency in accessing information about government and its services. Moreover, *amici* are gravely concerned that if coercive English-only laws

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[7] Calvin Veltman, *The Future of the Spanish Language in the United States* 44-45 (1988). For example, by the time they have been in the country for 15 years, approximately 75% of all Hispanic immigrants are speaking English on a regular basis. Indeed, more than 75% of immigrants who have arrived in the United States before reaching 14 years of age have made English their everyday language. *Id.* at 40.

[8] *Id.* at 49.

[9] The number of legal immigrants to the United States over the past three fiscal years has been 904,292 (1993), 804,416 (1994), and 720,461 (1995). Immigration and Naturalization Service, U.S. Dep't of Justice, *Immigration to the United States in Fiscal Year 1995*, at 1 (1996).

[10] Insensitivity and indifference to language barriers also impede the flow of information between the government and non-English-speaking constituents. *See* Melita Garza, *CHA Opens Section 8 Lists For Latinos*, Chi. Trib., Apr. 23, 1996, at A1 (Chicago Housing Authority admitted that it had purged from Section 8 housing waiting lists Latino applicants who failed to respond to letters sent to them in English).

like Article XXVIII are upheld, CBOs will be overwhelmed by non-English-speaking persons who would be cut off from direct access to vital government information and services.[11] Even assuming that CBOs could meet this demand, they would be forced to redirect scarce resources to provide (1) comprehensive translation services for communication between non-English speakers and government employees, and (2) multilingual services and information presently being provided more effectively and efficiently by all levels of government. The result would be not only to exclude non-English speakers from communication with government, but also to undermine the ability of CBOs to continue providing vital programs and assistance to their constituents.

## SUMMARY OF ARGUMENT

Article XXVIII unconstitutionally impairs the First Amendment rights of both government employees and non-English-speaking Arizonans by banning protected speech -- in this case, the communication of information about government and its services in any language other than English.[12] Article

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[11] The absence of a coercive English-only law does not impose an affirmative obligation on state or local governments to provide information about rights and services in languages other than English. Rather, it allows these governments or their employees to use other languages to deliver efficiently and effectively information about government services to non-English speakers.

[12] Article XXVIII of the Arizona Constitution was passed as a ballot initiative in 1988. *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 924 (9th Cir. 1995) (*en banc*), *cert. granted*, 64 U.S.L.W. 3635 (U.S. Mar. 25, 1996). As other *amici* compellingly argue, Article XXVIII violates the First Amendment rights of Ms. Yniguez and other public employees by prohibiting them from conveying government (continued...)



XXVIII applies to all government officials and employees in the performance of government business. It therefore prohibits state officials and employees from speaking languages other than English with non-English-speaking constituents, a form of communication which the State has conceded improves efficiency. Article XXVIII also requires English as the language of public schools. Accordingly, it restricts the use of bilingual education, which has been widely recognized as the most effective method of teaching limited English-proficient children. Because Article XXVIII's broad sweep imposes an English-only requirement on state statutes, rules, programs and policies, it precludes the dissemination in languages other than English of information on various educational, public health and welfare programs which are designed to benefit *all* Arizonans.

Article XXVIII would shift to CBOs the burden of serving as primary providers of information about government to non-English-speaking Arizonans. CBOs already face limited funding for the services they provide, and this shift would likely result in a reduction in other forms of assistance for their constituents. Moreover, because the State would cede control of delivering its message to non-English speakers, information about government services may not be presented as effectively as if provided directly by the State itself.

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[12](...continued)
information and services to the public in any language other than English. *See* Brief of *Amici Curiae* American Civil Liberties Union *et al.* *Amici* CBOs will not repeat these arguments here. Instead, *amici* CBOs focus their legal argument on the impact of Article XXVIII on the First Amendment rights of non-English-speaking Arizonans. *See Brief for Petitioners* [hereinafter *Pet. Br.*] at 25-26.

Article XXVIII violates the First Amendment rights of non-English speakers in Arizona by erecting a barrier to their ability to receive information and ideas from their state and local governments. Article XXVIII also suppresses the flow of truthful information for the paternalistic purpose of compelling Arizonans to learn English. It does so by "hiding" information about government services and functions from non-English-speaking Arizonans. By denying access to information and impeding the free flow of information, Article XXVIII hinders non-English-speaking Arizonans' ability to participate in democratic society. In effect, it silences them, and silences government employees by preventing them from serving as sources of vital information. Such enforced silence is contrary to our Nation's commitment, embodied in the First Amendment, to the ideal of a free exchange of ideas and flow of information.

Article XXVIII's suppression of speech about government and government services does not promote any of the state interests asserted by Petitioners. Article XXVIII does not promote governmental "legitimacy." A legitimate democratic government serves *all* its constituents whether or not they speak English. Article XXVIII also does not promote national unity. To the contrary, it would divide society into those able to participate in government and those incapable of doing so. Nor does Article XXVIII foster a common language. English is -- and will continue to be -- the predominant language of the United States, which all attempt to learn in order to take advantage of the opportunities available in Arizona and the United States. For these reasons, Article XXVIII is repugnant to the First Amendment and our nation's democratic traditions. This Court should affirm the Ninth Circuit's decision invalidating Article XXVIII.



## ARGUMENT

### I. ARTICLE XXVIII FORECLOSES DIRECT ACCESS TO INFORMATION BY AND ABOUT GOVERNMENT FOR ARIZONANS WITH LIMITED ENGLISH PROFICIENCY.

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[13] *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Article XXVIII inhibits "the free discussion of governmental affairs" because it purposefully deprives non-English-speaking Arizonans of access to information about the government when multilingual access is necessary "to ensure fair and effective delivery of governmental services to non-English speakers."[14] Moreover, Article XXVIII would make the State's policy on the use of English inconsistent with federal law and policy, which do *not* require that immigrants to the United States, including those residing in Arizona, know

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[13] "Free discussion" necessarily implies protection not only for the speaker and provider of information but also for the audience and consumer of information. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (First Amendment protection extends to "the communication, its source and to its recipients both").

[14] Op. Att'y Gen. Az., I89-009, at 7 (1989), *reprinted in* Joint Appendix [hereinafter J.A.] at 71. The Arizona Attorney General's opinion construed Article XXVIII to be applicable only to "official acts of government." (J.A. 76.) This opinion, however, is not binding on Arizona courts. *See Yniguez*, 69 F.3d at 928-29.

English as a condition to entry.[15] *See* 8 *U.S.C.* §§ 1101 *et seq.* (1994).

The Arizona government at both state and local levels has recognized the importance of ensuring that non-English speakers are able to receive important information in a comprehensible form about, *inter alia*, education, legislative matters, consumer protection, health care, and public benefits by providing information in languages other than English.[16] This information is essential to both English and non-English speakers, and the broad dissemination of this information to *all* segments of society benefits the entire state. By prohibiting public employees and all state agencies from communicating information in languages other than English, Article XXVIII

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[15] The Clinton Administration has opposed recent attempts to adopt an English-only law at the federal level. *See* Letter from Andrew Fois, Ass't Att'y Gen., U.S. Dep't of Justice, to Hon. Ted Stevens, Chairman of the Senate Comm. on Governmental Affairs, U.S. Senate 2 (May 14, 1996) (on file with counsel for *amici*) ("The passage of [The Language of Government Act] would decrease administrative efficiency and exclude Americans who are not fully proficient in English from education, employment, voting and equal participation in our society.").

[16] At the federal level, Congress has implemented laws to protect the rights of non-English speakers to receive government information, and has taken affirmative steps to enable the non-English-speaking public to participate in meaningful communication with the government. *See, e.g.*, 42 U.S.C. § 1973aa-1a(b) (1994) (requiring bilingual voting materials for certain non-English speaking populations); 20 U.S.C. §§ 7401-7602 (1994) (providing funds to help states educate language minority residents); 42 U.S.C. §§ 254b(f)(3)(J), 254c(e)(3)(J) (1994) (requiring identification of bilingual staff members in federally-funded migrant and community health centers where there are substantial number of limited English-speaking clients).



denies access to this vast body of information by the non-English-speaking public.[17]

### A. Article XXVIII Impairs Communication with State Employees and Elected Officials in Languages Other Than English.

The examples of Ms. Yniguez and Senator Gutierrez illustrate the unreasonable barriers that Article XXVIII would place before limited English-speaking Arizonans seeking to receive government information or services. On behalf of the Risk Management Division, Maria-Kelley Yniguez spoke in Spanish to Spanish-speaking people who were asserting medical malpractice claims against the State of Arizona. (J.A. 45-46.) In the course of her official duties, Ms. Yniguez also prepared legal documents in Spanish so that Spanish-speaking citizens who were unable to read English could understand the legal import of the documents they were asked to sign. (J.A. 48.) Ms. Yniguez spoke Spanish on the job with the consent of her supervisors; in fact, at the request of her supervisors, Ms. Yniguez used her bilingual skills to help investigate other claims made against the State of Arizona. (J.A. 46.)

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[17] Article XXVIII's exceptions are limited and vague: non-English languages may be used to protect the rights of criminal defendants and victims, to protect public health or safety, to teach a foreign language, and to comply with federal laws. *Art. XXVIII*, § 3(2). Article XXVIII provides no guidance on how these exceptions are to be applied, yet, permits suits by private citizens to enforce the "official" use of English. *Id.*, § 4. In those instances where a state employee must interpret Article XXVIII's boundaries, the threat of employee sanctions and Article XXVIII's private right of enforcement would deter state employees from using any language other than English. *See, e.g.*, J.A. 86 (Ms. Yniguez ceased using Spanish on the job out of fear that "it would be contrary to the amendment" and "someone could bring a lawsuit against me").

Article XXVIII applies to "all government officials and employees during the performance of government business." *Art. XXVIII*, § 1(3)(a)(iv). It would thus prohibit bilingual employees like Ms. Yniguez from speaking Spanish on the job, and would thereby foreclose the most efficient form of government communication with non-English speakers. As Ms. Yniguez herself noted: "If I am not permitted to communicate in the Spanish language with persons who speak the Spanish language but not the English language, I will be denied the opportunity to obtain and disseminate information which is of public importance and interest." (J.A. 46.) The absurdity of Article XXVIII, and the waste of resources it would engender is obvious: a private citizen would be needed to translate a conversation between a Spanish speaker and Ms. Yniguez about a medical malpractice claim, even though Ms. Yniguez could speak directly to the Spanish speaker in Spanish.

Similarly, state legislators such as Senator Jaime Gutierrez have relied on their foreign language skills to ensure that their non-English-speaking constituents are not denied access to the government. (J.A. 78-79.) Senator Gutierrez has used Spanish with his non-English-speaking constituents to provide "educational material regarding State government," and to permit "entry or access into State government for resolution of whatever types of problems one may have." (*Id.* at 79.) However, Article XXVIII applies to the "Legislative, Executive and Judicial branches of government," *Art. XXVIII*, § 1(3)(a), and mandates that the English language is the language of "all government functions and actions," *id.*, § 1(2). Article XXVIII would thus ban legislators from speaking with or writing to their constituents in any language other than English. *See Yniguez*, 69 F.3d at 950 (Brunetti, J., concurring). Even though State representatives may share



fluency in a non-English language with their constituents, they would not be allowed to communicate in that language to describe legislative developments or proposed legislation, or to seek input on what actions they should take on their constituents' behalf -- communication at the core of the First Amendment and our democratic form of government.

### B. Article XXVIII Restricts the Educational Opportunities of Non-English-Speaking Arizonans.

Article XXVIII restricts educational opportunities by preventing Arizonan children with limited or no proficiency in English from receiving bilingual education -- widely regarded as the most effective form of language instruction. Many educators agree that incorporating the student's native language in teaching is the best method to achieve fluency in both English and the student's native language in the shortest amount of time, and still ensure that the student learns the substantive content of the subject being taught.[18] Article XXVIII ignores these findings -- with no justification except to coerce the use of English -- and requires English to be the language of the public schools. *Art. XXVIII*, § 1(2). As a result, over 90,000 K-12 students in Arizona[19] would be denied

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[18] *See, e.g.*, Wayne P. Thomas & Virginia P. Collier, *Research Summary of Study in Progress: Language Minority Student Achievement and Program Effectiveness* (1995). This study examined approximately 42,000 student records, and found that language minority students reached English fluency in five to ten years if taught in English only. The use of bilingual instruction, however, reduced this time to four to seven years.

[19] Bilingual Educ. Unit, Arizona Dep't of Educ., *Bilingual Programs and English as a Second Language Programs Annual Report 1992-1993*, at 13 (1994).

the most effective form of educational instruction.[20] Arizona school districts that have successfully educated language minority youths in the past through the use of native language instruction would be forced to abandon bilingual education. Therefore, Article XXVIII would effectively ban the option of bilingual education and require less effective means for educating non-English-speaking students.

Article XXVIII undermines the educational process in other ways as well. Non-English-speaking parents already face great difficulty participating in their children's education. *See* 20 U.S.C. § 7402(a)(5)(C) (1994). Article XXVIII would increase that difficulty because it appears to preclude public school teachers from communicating directly with non-English-speaking parents in languages other than English. Although educators have found that a student's academic performance is strongly affected by the parents' participation in the child's

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[20] Article XXVIII purports to create an exception to English-only instruction "to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English." *Art. XXVIII*, § 3(2)(a). This exception, however, is meaningless because federal law does not specifically mandate native language instruction; it only requires that (1) school districts provide sound educational programming to limited English proficient students through which they can acquire English language skills, and (2) the educational program produces results indicating that the language barriers are being overcome. *See Castaneda v. Pickard*, 648 F.2d 989, 1009-11 (5th Cir. 1981).



schooling,[21] Article XXVIII removes this critical support from the child's education.

Article XXVIII would also harshly impact non-English-speaking families with children in special education programs. The State of Arizona currently requires each local educational agency ("LEA") and State-supported institution ("SSI") to provide information regarding the rights of handicapped children in a language comprehensible to the parents, regardless of their ethnic, linguistic, or cultural background. Ariz. Admin. Code § R7-2-401(B)(1) (1995). All communications from the LEA or SSI to the language minority parents about any special education matter must be in the primary language of the home. *Id.* § R7-2-401(C)(7). Furthermore, the State must provide an interpreter during an individualized education program planning conference if either the parent or child has limited English proficiency. *Id.* § R7-2-401(F)(3). These services are designed to increase the parents' level of participation in the educational process to ensure that children receive an effective education. These services are not likely to be available because Article XXVIII precludes state employees from using any language other than English.

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[21] *See* Dinah Volk, *A Case Study of Parent Involvement in the Homes of Three Puerto Rican Kindergartners*, 14 J. Educ. Issues Lang. Minority Students 89 (1994) ("parent involvement is frequently described in the literature as critical to the development of academic achievement, cognitive development, self-esteem, motivation, and self-discipline").

### C. Article XXVIII Suppresses the Dissemination of Information Intended to Promote Public Awareness and Welfare.

Recognizing that providing information only in English does not adequately inform all Arizonans, the State of Arizona has adopted laws and regulations to ensure that the non-English-speaking public understands basic information about their rights and responsibilities. These laws are likely to be declared unconstitutional under Article XXVIII. *See Art. XXVIII*, § 1(3)(a)(iii) (English-only requirement applies to "all statutes, ordinances, rules, orders, programs and policies").

For example, Arizona currently requires all businesses that process consumer loans to post conspicuous signs in English *and* Spanish stating that legally-required disclosures must be provided in Spanish at the borrower's request. Ariz. Rev. Stat. § 6-651(A)(2) (1995). It would be inconsistent with Article XXVIII for the State to mandate that private organizations publish consumer protection notices in any language other than English. Language minorities would thus be placed at a substantial disadvantage in situations where the State itself has recognized a critical need for consumers to be aware of their rights in order to make informed decisions.

In the area of health care, Arizona requires that patients with serious medical or mental conditions must be informed of their rights in a language which they understand.[22] Without

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[22] *See* Ariz. Admin. Code § R9-20-201(A)(10) (1996) (all clients of behavioral health service agencies have a right to be informed of all rights in the client's primary language); *id.* § R9-21-315(B) (client or applicant for mental health services must be informed by written notice in English and Spanish of rights to appeal); *see also id.* § R9-22-518 (continued...)



this support, the most vulnerable members of society are left to fend for themselves since they would not be aware of the rights and protections that they are entitled to receive by law.[23]

Non-English-speaking Arizonans would even be foreclosed under Article XXVIII from obtaining the knowledge necessary to exercise basic rights and benefits enjoyed by English-speaking Arizonans. Currently, government agencies print information in Spanish on a variety of topics, including energy conservation, the rights of utility customers, gang membership deterrences, accessing emergency medical services, obtaining health care for children of low-income families, and maintenance of privately-owned gas pipelines served by public utilities.[24] Providing such information in languages other than English is likely to be foreclosed by Article XXVIII because it requires the use of English by "all political subdivisions, departments, agencies, organizations, and instrumentalities" of the State. *Art. XXVIII*, § 1(3)(a)(ii).

The availability of information on public health and consumer education programs in languages other than English benefits *all* Arizonans by increasing the number of informed

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[22](...continued)
(companies that contract with the State of Arizona to provide health services must provide written descriptions of their services and fees in English and in a second language when 200 members or 5%, whichever is greater, of the population enrolled in the health plan are non-English-speaking).

[23] Article XXVIII includes an exception "to protect public health or safety." *Art. XXVIII*, § 3(2)(d). However, neither the nature nor the beneficiaries of this "protection" have been delineated.

[24] Examples of this information have been lodged with the Court by *amici* CBOs.

Arizonans and, thereby, the potential for participation in the programs. However, by requiring the use of only English, Article XXVIII cleaves society into those able to obtain and understand such government information and non-English speakers who must turn elsewhere -- most likely to CBOs -- to receive the same information, to the detriment of society as a whole.

## II. ARTICLE XXVIII IMPEDES COMMUNICATION WITH THE GOVERNMENT BY NON-ENGLISH-SPEAKING ARIZONANS BY IMPOSING ENORMOUS BURDENS ON CBOS.

If Article XXVIII were enforced, it would shift to private parties, like CBOs, the burden of providing information about government to over 100,000 limited English-speaking Arizonans, thereby creating additional barriers to receipt of such information.[25]

### A. Funding for CBOs Is Limited.

In a time of declining resources and increasing demand for assistance, Article XXVIII would force CBOs to assume the additional burden of serving as primary providers of information about government to non-English-speaking

[25] In addition to requiring the use of only English by the State, its officials, agencies and employees, Article XXVIII provides all persons residing or doing business within the State with the right to sue to enforce its English-only restrictions. *Art. XXVIII*, § 4. This private right of enforcement would have a direct chilling effect not only on state employees like Ms. Yniguez (*see* J.A. 52), but also on all persons or entities within the State at any point of communication with the State or its representatives.



Arizonans.[26] CBOs already face difficulty in meeting the present demand for these services. Article XXVIII would create the need for CBOs to expand translation services in order for non-English speakers to obtain information about government and government services. To the extent that CBOs are called on to serve as interpreters, they would pay a substantial price in funds and employees diverted from other much-needed programs such as: immunization clinics; child care; educational services; assistance to domestic violence victims; legalization and naturalization services; employment counseling; developing, renovating and providing housing for low-income families; mental health services and counseling; and substance abuse prevention and treatment. Ultimately, the cost of Article XXVIII would be borne by the constituents of CBOs in the form of reduced assistance. Thus, by shifting the burden to convey government information to CBOs, Article XXVIII increases the likelihood that the government's message will not be received.

### B. Forcing Private Parties to Disseminate Information About Government Hinders Receipt of Accurate Speech.

Foreclosing direct access to communication with the Arizona government does not erase the acute need of non-English-speaking residents for government information and services. Therefore, to communicate with or to receive information about the government of Arizona, many more non-

[26] The State of Arizona could not condition funding for CBOs on the use of only English in the provision of services without violating the CBOs' First Amendment rights. *See Board of County Comm'rs, Wabaunsee County, Kansas v. Umbehr*, 64 U.S.L.W. 4682 (U.S. June 28, 1996).

English-speaking Arizonans will turn to CBOs. Article XXVIII, in effect, forces the State to cede control of its message and to rely on third parties with less familiarity and understanding about government programs to communicate directly with non-English speakers.

Even assuming that translation-on-demand would be available to non-English speakers (and without a corresponding reduction in other forms of assistance), there is no assurance that the government's message will be accurately translated or fully communicated by CBOs. While misinterpretation would certainly not be intentional, it is likely to occur, particularly when the information being translated is technical in nature or concerns complex issues. For instance, Ms. Yniguez, based on her experience in investigating medical malpractice claims involving the State, is in a better position than employees of CBOs to communicate information concerning the State's procedures for resolving such claims.

Nor will a literal translation of the government's message always be sufficient. In many cases, it would be important to convey the proper context and background along with the particular facts being communicated. For example, the description of a particular aspect of bringing a medical malpractice claim against the State may take on a fuller or even different meaning if accompanied by an explanation of the tort law of Arizona or administrative proceedings in general. The government employee representing a particular agency or program is in the best position to convey the message and its context -- not the third-party interpreter.

Moreover, Article XXVIII reduces government's and society's stake in ensuring that *all* persons participate directly in democratic society, and compels CBOs to assume the role of intermediaries between the non-English-speaking public and



government.[27] In contrast to the government as provider of this information, the numerous CBOs providing information to non-English-speaking Arizonans are likely to interpret the information differently and place it in different contexts. Ultimately, if CBOs become the primary source of information about government and the services it provides, the information will not be presented in a unified voice or as accurately as it would were the government the sole, multilingual speaker.

## III. ARTICLE XXVIII VIOLATES THE FIRST AMENDMENT AND ITS PROTECTION OF THE RIGHT TO KNOW AND THE FREE FLOW OF TRUTHFUL INFORMATION.

### A. Article XXVIII Abridges the Right of Non-English-Speaking Arizonans to Receive Information From and About Government.

Nearly two centuries ago, James Madison recognized the importance of the right to receive information and ideas, or, simply put, the "right to know":

> A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.

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[27] Because Article XXVIII would force the state to abdicate its responsibility to provide information to non-English speakers, CBOs may be hesitant to refer non-English speakers to the government for assistance. If no translation service were available, it would be futile to send non-English-speaking clients to a government office.

Letter from James Madison to W.T. Barry (Aug. 4, 1822), *quoted in* Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 Wash. U. L.Q. 1 (1976). This Court has since recognized in a number of different contexts the fundamental importance of the "right to know." It first clearly identified the right in *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965), when it upheld the right of citizens to receive "foreign communist propaganda" from abroad without having to notify the government.[28] Echoing James Madison's sentiments, Justice Brennan declared that "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Id.* at 308 (Brennan, J., concurring).

That same year, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court reemphasized the importance of the right to know when it struck down a Connecticut statute forbidding the use of contraceptives:

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[28] The Court, however, has traced the genesis of the right to know to the early eighteenth century. In *Grosjean v. American Press Co.*, 297 U.S. 233, 240 (1936), the Court described in detail the history leading to the adoption of the Free Speech Clause of the First Amendment. In 1712, the British Parliament imposed a "knowledge tax" on all newspapers and advertisements to suppress comments and criticisms objectionable to the Crown. Many citizens of England and the American Colonies protested this tax because it interfered with their ability "to establish and preserve [their] right to . . . full information in respect to the doings and misdoings of their government." *Id.* at 247. From this experience, the Framers drafted the Free Speech Clause to prevent "'any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.'" *Id.* at 249-50 (quoting 2 Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 886 (8th ed. 1927)).



> In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach.

*Id.* at 482 (citations omitted). Only four years later, this Court stated that "[i]t is now well established that the Constitution protects the rights to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). "This right to receive information and ideas is fundamental to our free society." *Id.*

At the heart of the right to know recognized in *Lamont*, *Griswold*, and *Stanley* is the ability to receive information and ideas about the government and its business.[29] This right protects "the free discussion of governmental affairs." *Landmark Communications*, 435 U.S. at 838. By purposefully depriving language minorities of access to information about governmental affairs and services, Article XXVIII unconstitutionally abridges non-English-speaking Arizonans' right to know and inhibits participation in the "free discussion" of issues and ideas at the core of the First Amendment.[30]

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[29] *See, e.g., Landmark Communications*, 435 U.S. at 837-842 (publication of truthful information in official commission records); *see also Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (First Amendment affords broadest protection to information regarding political affairs to assure "unfettered interchange of ideas" for bringing about political and social changes); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (public dissemination of information regarding foreign policy).

[30] Petitioners' claim that the Tenth Amendment insulates Article XXVIII from First Amendment scrutiny is fundamentally flawed. *See*

(continued...)

### B. Article XXVIII Suppresses the Free Flow of Truthful, Nonmisleading Information.

The corollary to the right to receive information and ideas is the principle that the government does not have broad discretion to impose laws that purposefully suppress truthful, nonmisleading information merely for paternalistic purposes. *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923). "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart*, 116 S. Ct. at 1508. Article XXVIII does just that by "hiding" truthful information from non-English-speaking citizens in an effort to force them to speak English "for their own good."

This Court has most often articulated this concern with hiding truthful information in the context of restrictions on the right of citizens to receive information on commercial transactions. *See 44 Liquormart*, 116 S. Ct. at 1508; *Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084, 2088-89 (1994); *Bates v. State Bar of Arizona*,

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[30](...continued)
*Pet. Br.* at 30-32. Article XXVIII is not an act of the federal government which encroaches upon police powers reserved to the states. *See United States v. Lopez*, 115 S. Ct. 1624 (1995). Moreover, through Article XXVIII, the State of Arizona would impermissibly impair individual rights guaranteed by the United States Constitution to Arizona residents. If there is any principle which stands clear, it is surely that neither Arizona nor any other state can abridge the individual liberties protected by the Bill of Rights in the name of "states' rights." *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (Tenth Amendment cannot save legislation prohibited by Fourteenth Amendment); *Gulf, Colo. & S.F. Ry. v. Hefley*, 158 U.S. 98 (1895) (powers reserved to the states must be exercised in subordination to the federal Constitution).



433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy*, 425 U.S. at 773. In striking down Rhode Island's statutory prohibition against advertisements that provided the public with accurate information about retail prices of alcoholic beverages, this Court stated that "bans that target truthful, nonmisleading commercial messages . . . not only hinder consumer choice, but also impede debate over central issues of public policy." *44 Liquormart*, 116 S. Ct. at 1508. Likewise, in *Virginia State Bd. of Pharmacy*, the Court concluded that the free flow of commercial information was indispensable to ensuring that individuals make informed and intelligent economic decisions.

Just as advertising plays a central role in informing debate in our free market economy, the free flow of information from the State regarding government services is indispensable to maintaining our democratic form of government:

> [The First Amendment] embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.

*Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) (footnote and citations omitted).

Article XXVIII is an unconstitutional restraint on the marketplace of ideas and discourse. It impedes the free flow of information necessary to have an informed populace by silencing non-English speakers and those government

employees that could communicate with them. Such enforced silence is contrary to our Nation's commitment, embodied in the First Amendment, to the ideal that the free exchange of ideas is the best method of resolving controversial issues.

As Justice Brandeis exclaimed in his objection to a prohibition of political speech, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Accordingly, the State cannot purposefully exclude a segment of the population from the free debate on government and what it does, nor suppress direct communication between the government and the governed. "The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." *Meyer*, 262 U.S. at 401.

## IV. ARTICLE XXVIII DOES NOT PROMOTE ANY OF THE ASSERTED STATE INTERESTS.

### A. Article XXVIII Does Not Promote Efficiency, Effectiveness or Accuracy.

Petitioners claim that Article XXVIII promotes Arizona's interests in "efficiency, effectiveness, accuracy, legitimacy and encouragement of unity." *Pet. Br.* at 37. But the State has already conceded that its operations are more efficient if government employees are permitted to communicate with a non-English speaker in the constituent's native language. (J.A. 53-54.) As evidenced by the State's own action in providing information in languages other than English, it is also more effective and more accurate *not* to require that all communication by the State be made only in English. Accordingly, Petitioners cannot legitimately claim that Article XXVIII promotes efficiency, effectiveness and



accuracy, interests which the State, by admission and by deed, has conceded Article XXVIII obstructs.

### B. Article XXVIII Does Not Promote Governmental "Legitimacy."

Petitioners assert that Article XXVIII promotes some allegedly "valid State interest in [Arizona's] own legitimacy." *Pet. Br.* at 36. In fact, this alleged State interest is merely a euphemism for Petitioners' blatantly discriminatory attempt to exclude linguistic minorities from the democratic process, which is not a "legitimate" State interest at all. *See Romer v. Evans*, 116 S. Ct. 1620 (1996).

In the one case that Petitioners cite for this assertion, *United States v. International Union United Auto. Workers*, 352 U.S. 567 (1957), this Court upheld a statute intended to protect the role of individuals and minorities in the electoral process by prohibiting contributions by corporations and unions to electoral campaigns for federal office. The teaching of that case, if at all relevant in this context, is that government promotes its "legitimacy" by *not* adopting the majority view when necessary to ensure that the voice of the minority is heard. Article XXVIII does the precise opposite by ensuring that *only* the voice of the majority is heard, to the detriment of non-English speakers. As Congressman Mineta noted regarding a proposed English Language Amendment to the United States Constitution, English-only laws "set up a class of 'outsiders'--unable to communicate with their government, and their government unable to communicate with them -- all based on language skills."[31]

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[31] *English Language Constitutional Amendments: Hearings on H.J. Res. 13 Before the Subcomm. on Civil and Constitutional Rights of the*

(continued...)

Petitioners illustrate the alleged state interest in governmental legitimacy with the story of an English speaker unable to find someone at a government office who spoke her language. *Pet. Br.* at 36. Were the languages simply reversed, this story represents exactly the circumstances in which non-English speakers in Arizona would find themselves in an English-only government.[32] Moreover, using Petitioners' reasoning, this scenario illustrates the perception of governmental "illegitimacy" that linguistic minorities in Arizona would hold if the State mandates that its employees speak only English.

Ultimately, legitimacy of government is not promoted by adopting a constitutional amendment which "officially" denies the existence of language minorities, and "officially" imposes a unified, English-only facade for Arizonans. The State of Arizona must serve all Arizonans, not just those who need reassurance that the State speaks like the English-speaking majority. Article XXVIII permits the government to abdicate its responsibility to ensure that *all* its constituents participate in democratic government and allows it to rely on the altruism

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[31](...continued)
*Comm. on the Judiciary*, 100th Cong., 2d Sess. 2 (1988) (statement of Rep. Norman Y. Mineta).

[32] The burden of coercive language choice on the rights of non-English-speaking Arizonans is readily apparent by taking Petitioners' argument to its logical conclusion. Petitioners claim that "Arizona may choose the language in which it will speak." *Pet. Br.* at 20. If, for example, the State legislature required all government communication in only Navajo, to encourage persons in the State to appreciate the contributions and heritage of Navajo culture to Arizona, such a language choice law would surely be struck down as impermissibly burdening the right of non-Navajo-speaking Arizonans to participate in the "free discussion of governmental affairs."



of private parties such as CBOs to communicate with non-English-speaking Arizonans. While CBOs serve language minorities in many ways, they cannot substitute for government itself.

### C. Article XXVIII Does Not Promote National Unity or Use of a Common Language.

While national unity has been deemed a legitimate government interest in certain contexts,[33] Article XXVIII, *by coercion*, does not promote that interest.[34] Language alone cannot promote national unity. Without other, more important common bonds, such as the belief in a democratic form of government and equality of opportunity, a common language would be of little use.[35] For example, sociolinguist Karl Deutsch has found that language is not a necessary or sufficient condition for a sense of nationalism. Deutsch points out:

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[33] *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943) ("National unity as an end which officials may foster *by persuasion and example* is not in question.") (emphasis added).

[34] *See id.* ("The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement."). Federal law does not seek unity through use of only English. For example, federal law provides that "[t]he right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs." 25 U.S.C. § 2904 (1994).

[35] *See* Valerie A. Lexion, Note, *Language Minority Voting Rights and the English Language Amendment*, 14 Hastings Const. L. Q. 657, 677 (1987). Indeed, Petitioners themselves acknowledge that "unity comes from a common language and a core public culture of certain shared values, beliefs, and customs which make us distinctly 'Americans.'" *Pet. Br.* at 36-37.

> The Swiss may speak four different languages and still act as one people, for each of them has enough learned habits, preferences, symbols, memories, patterns of landholding and social stratification, events in history, and personal associations, all of which together permit him to communicate more effectively with other Swiss than with the speakers of his own language who belong to other peoples.[36]

Furthermore, Article XXVIII is not needed to promote use of a common language. America already has a common language--English. The 1990 United States census statistics show that only 3.1% of the census respondents do not speak English well or very well.[37] Given the widespread acceptance and use of English,[38] it is an essential role of government to

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[36] Karl W. Deutsch, *Nationalism and Social Communication* 97 (1966), *quoted in* Andre Solé, *Official English: A Socratic Dialogue/Law and Economics Analysis*, 45 Fla. L. Rev. 803, 825 (1993).

[37] 86.2% of adult respondents to the 1990 census survey speak *only* English. 77.4% of the remaining 13.8% individuals who speak a non-English language at home indicated that they spoke English well or very well. 1990 U.S. Census, *Population Data, Table ED 90-5, Language Use and English Ability, Persons 18 Years and Over, by State* (*available in* Westlaw database CENDATA).

[38] *See Statement of the National Education Association on English as a Common Language*, Submitted to the Subcomm. on Early Childhood, Youth and Families of the Comm. on Economic and Educational Opportunities, U.S. House of Rep. 2 (Nov. 1, 1995) ("People who live in the United States understand and accept the economic importance of learning English and don't need a law to force them to learn it."). Even now, the educational system cannot keep up with the demand for English as a Second Language classes. *See* Elaine Woo, *Immigrants--A Rush to the Classroom*, L.A. Times, Sept. 24, (continued...)



recognize the existence of linguistic minorities and strive to ensure their participation in and access to government.

Ultimately, attempts to compel unity by suppressing language result in divisiveness.[39] Over fifty years ago this Court perceptively stated: "Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what . . . shall compel [Americans] to unite in embracing." *Barnette*, 319 U.S. at 641. The Court recognized the ultimate futility of such attempts to compel unity "from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, [and] the Siberian exiles as a means to Russian unity." *Id.* Here, as in *Barnette*, "[a]s governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be." *Id.*

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[38](...continued)
1986, at 1 (over 40,000 persons in Los Angeles County on waiting list for English classes).

[39] *See, e.g.*, Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv. C.R.-C.L. L. Rev. 293, 295 (1989) ("English-Only laws are divisive and succeed only in stigmatizing Hispanics."); *see also* Hugo Beardsmore & Roland Willemyns, *Comment*, 60 Int'l J. Soc. Lang. 117, 120-21 (1986) (tensions in bilingual nations such as Belgium due not to bilingualism *per se*, but rather to historical factors and lack of equality afforded to subordinate language group).

## V. CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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# APPENDIX

## APPENDIX

**National Council of La Raza (NCLR) (Washington, D.C.)**

NCLR is the nation's principal constituency-based Hispanic organization, serving all Hispanic subgroups in all regions of the country. Headquartered in Washington, D.C., NCLR has program offices in Los Angeles, Phoenix, Chicago, and San Antonio. NCLR annually reaches over two million Hispanics through a formal network of "affiliates" - over 200 organizations serving 37 states, Puerto Rico, and the District of Columbia - and a broader network of more than 20,000 groups and individuals nationwide. NCLR is a private, non-profit, non-partisan, tax-exempt organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans.

**Ayuda, Inc. (Washington, D.C.)**

Founded in 1971, Ayuda, Inc. is a nonprofit, community-based organization that offers high-quality legal services to low-income, Spanish-speaking, and foreign-born men and women of the Washington, D.C. metropolitan area. It strives to assure equal treatment under the law for all and to inform clients of their rights and obligations under the laws of the United States and the District of Columbia. Ayuda's staff of lawyers and paralegals, assisted by volunteers, offer their expertise in the areas of immigration, domestic relations, and domestic violence.

**Alivio Medical Center (Chicago, IL)**

Alivio Medical Center is a bilingual, bicultural organization committed to providing access to quality, cost-effective health care primarily to the Hispanic community, the

uninsured and the underinsured, without excluding other cultures and races. This mission is expressed through the provision of services, advocacy, education, research, and evaluation.

**American G.I. Forum of the United States (AGIF) (Austin, TX)**

AGIF was founded in 1948. Local chapters function under a regional or state structure. The GI Forum pursues the interests of veterans and Hispanics in the areas of education, youth leadership and motivation, employment, civil rights, legislation, and communications.

**Amigos del Valle, Inc. (Mission, TX)**

Founded in 1974, Amigos del Valle, Inc. aims to maintain the elderly population of South Texas mentally, physically, and socially, so as to enhance an independent lifestyle. It provides comprehensive services to the elderly in the lower Rio Grande Valley of Texas, including housing, meals, recreation, transportation, and emergency services. Its constituency is the 60 year-old and older population of Hidalgo, Willacy, and Cameron Counties, of which more than 85% are Hispanic, and the majority are from farmworker families. Amigos serves 3,500 elderly daily at 34 centers, and owns and manages 300 units of housing for the elderly.

**Arizona Hispanic Chamber of Commerce Foundation (AHCC) (Phoenix, AZ)**

Founded in 1991, the mission of AHCC is to run programs which focus on community, economic, and business development through advocacy, action-based research, a business loan pool, and entrepreneurial skills training. AHCC currently runs *Revive Arizona!*, a rural economic development



program funded by the U.S. WEST Foundation. AHCC also has a contract with the U.S. Department of Transportation to create a database of small and disadvantaged businesses in a specific region. This database will be used to provide information on transportation-related procurement opportunities.

**Asian American Lawyers Association of Massachusetts, Inc. (AALAM) (Boston, MA)**

AALAM is a nonprofit organization comprised of nearly 100 Asian Pacific American attorneys in the Commonwealth of Massachusetts. AALAM seeks to promote and enhance the role of Asian Pacific American attorneys in the profession, as well as to identify, address, and monitor legal issues of concern to the Asian American community. AALAM's members practice in a variety of settings, including major law firms, legal services organizations, government, corporations, and nonprofit organizations. AALAM is the Massachusetts affiliate of the National Asian Pacific American Bar Association, a membership organization of nearly 5,000 Asian Pacific American attorneys throughout the country.

**Asian Law Alliance (ALA) (San Jose, CA)**

ALA was established 19 years ago by Santa Clara law students to provide legal assistance, education, advocacy, and organizing support to the Asian Pacific Islander community in Santa Clara County. As the only legal services organization serving this Asian Pacific Islander population of almost 300,000, ALA is dedicated to ensuring top-quality multilingual and multicultural legal assistance to promote dignity, self-reliance, and a better quality of life for the people it assists.

**Asociación Pro Servicios Sociales, Inc. (Laredo, TX)**

Asociación Pro Servicios Sociales, Inc. is a community-based organization which provides advocacy, community and economic development, immigration and legalization services, and information and referrals. It provides local projects with technical assistance and financial support. Asociación also operates a food bank for the low-income population of Laredo County, Webb County, and the surrounding area.

**CASA of Maryland (Takoma Park, MD)**

CASA of Maryland is a nonprofit organization founded in 1985 that provides direct assistance, education, advocacy, and empowerment services to the Latin American community in the suburban Maryland/Washington, D.C. area. Its programs and services include: human services information and counseling; translations and applications assistance; immigration counseling and assistance; adult literacy instruction; leadership development activities; community advocacy; and an employment and training center which provides job skills training, temporary and permanent job placement, driver education classes, pre-employment life skills counseling, and legal rights instruction for workers and immigrants.

**Center for Hispanic Policy and Advocacy (CHisPA) (Providence, RI)**

Founded in 1986, CHisPA is a nonprofit organization dedicated to improving the social, economic, political, and educational status of Rhode Island's Latino community. CHisPA provides support and advocacy to groups and individuals working for Hispanics in the state. CHisPA's projects include a Community Leadership Development



Initiative, Hispanic Health Coalition, an urban Promotoras de Salud Model program, Project CASA, a Latino homeownership program, and management of the Juanita Sanchez Multiservice Center, where five nonprofit organizations provide services to the community. CHisPA also provides technical assistance to emerging grassroots groups, conducts research and policy analysis, and advocates on behalf of Rhode Island Latinos.

**Center for Training and Careers, Inc. (CTC) (San Jose, CA)**

Founded in 1944, CTC provides vocational training to unemployed and economically disadvantaged residents of Santa Clara County, including direct services in employment and training. Skills training programs include: Core Competencies, Adult Basic Education, Automated Office Technology, Computer Operation/Data Entry, Desktop Publishing, Medical Secretary, Offset Printing, Remedial Education, Word Processing, and GED Preparation.

**Centro de Amistad, Inc. (Guadalupe, AZ)**

Founded in 1977, Centro de Amistad, Inc. is a community-based behavioral health agency which strives to empower the Indolatino community to be healthy -- physically, mentally, and spiritually -- through various programs. Its programs include: outpatient behavioral and mental health therapy; wellness services; immunization clinics; prenatal support/education for pregnant women; well baby clinics; diabetes screening; and exercise/education related activities with an organizational/leadership component. Centro de Amistad is also currently developing policy, advocacy, training, and experimental models relating to the Indolatino population.

**Centro de la Familia de Utah (Salt Lake City, UT)**

Centro de la Familia de Utah has been providing direct services and advocacy for Utah's minority populations since 1975. Although Centro de la Familia addresses the problems common to most minorities, it has developed a particular expertise with respect to Hispanics, and its mission is to strengthen the Hispanic family by promoting self-sufficiency. To achieve this, it works to: provide services that will strengthen the family; develop linkages with other providers to facilitate these services; mobilize Hispanic community resources; provide data on the Hispanic community; identify and eliminate gaps in the social service delivery system; institutionalize its organizational philosophy; conduct data collection and evaluations to enhance its programs; and provide training opportunities to Hispanics and non-Hispanics.

**Centro de Salud Familiar La Fé, Inc. (El Paso, TX)**

Founded in 1968, Centro de Salud Familiar La Fé, Inc. is a community health center that provides comprehensive health care services primarily to the indigent Hispanic community of El Paso County. Primary health care services include: clinical evaluation; gynecology; adolescent care; immunizations; pre- and post-natal care; family planning; podiatry; HIV screening, treatment, and case management; and comprehensive dental services. Auxiliary services include pharmacy, diagnostic laboratory, radiology, referrals, patient transportation, translations, health education programs, and social services.

**Centro Latino de San Francisco (San Francisco, CA)**

Founded in 1972, Centro Latino de San Francisco strives to enhance the quality and lifestyle of the elderly in San Francisco. It provides individual and group counseling for



seniors needing professional attention; employment and housing advocacy; recreational and educational activities; assistance in securing Medicare, Medi-Cal, and Social Security benefits; and hot nutritious lunches for seniors both on-site and at home. Centro Latino also offers educational programs for families in collaboration with NCLR's $C^2E^2$ program. It provides evening family reading classes for adults and an after-school *Academia del Pueblo* academic enrichment program for at-risk elementary school students. It also administers testing and provides citizenship classes in English and Spanish.

**CHARO Community Development Corporation (Los Angeles, CA)**

Founded in 1967, CHARO Community Development Corporation's mission is to design programs which provide quality services with a positive return on resource investment and to contribute toward the economic and social improvement in the Latino community. CHARO accomplishes this by developing self-sustaining programs, ensuring the quality of services, and encouraging a collaborative process with the community. It operates the following divisions: economic development; environmental services; CHARO Industries; affordable housing development; career center; and child care development centers.

**Chicano Federation of San Diego County, Inc. (San Diego, CA)**

The Chicano Federation of San Diego County was formed in 1968 to develop leadership in the Mexican-American community, promote community development, provide high-quality services, and advocate on behalf of the Latino community. It provides employment and training, social and health services, conducts economic development projects, and

constructs housing for elderly and low-income residents of San Diego County.

**Chicanos Por La Causa, Inc. (CPLC) (Phoenix, AZ)**

Founded in 1969, CPLC's mission is to provide individuals and families in the community the opportunities they need to improve their quality of life. Now a statewide organization with offices in several communities, CPLC has developed into a community development corporation which carries out housing and economic development activities such as planning, research, and technical assistance for small businesses, as well as social, employment, education and training, counseling, and legalization services for low-income people throughout Arizona.

**Chinese Progressive Association (CPA) (Boston, MA)**

CPA is a grassroots community-based organization whose mission is to work for full equality and empowerment for Chinese Americans. CPA has a workers' center which is run by and for immigrant workers to educate, organize, and advocate for their rights on the job or on the unemployment line. CPA also provides English-as-a-Second-Language and citizenship classes, and drop-in social services to hundreds of immigrants each year.

CPA was founded nearly twenty years ago and is best known for its organizing around such issues as immigrant rights and political empowerment; workers' rights to decent wages, working conditions, and a safety net for the unemployed; parent decision-making and participation in children's education; and community control of land development and environmental justice.



**Clínicas de Salud del Pueblo, Inc. (Brawley, CA)**

Founded in 1970, Clínicas de Salud del Pueblo, Inc. works to provide direct access to comprehensive, quality primary and preventive health care for underserved residents of the Imperial and Palo Verde Valleys of Southern California. It operates six rural health clinics which provide walk-in medical services at an affordable cost. Its services include family planning, health education, Women and Infant Care nutrition, social services, transportation, and a Boys & Girls Club.

**Colonias del Valle, Inc. (Pharr, TX)**

Colonias del Valle, Inc. provides advocacy and resource mobilization to improve the socio-economic conditions of residents of *colonias* (rural unincorporated communities), and to upgrade substandard housing through weatherization and rehabilitation. Its constituency is primarily farmworker families in the Lower Rio Grande Valley of South Texas. Programs include day care, education, job skills training, and infrastructure development.

**Corporate Fund for Children (Austin, TX)**

The Corporate Fund for Children was established in 1979 by the Levi Strauss Foundation and the Texas Department of Human Services to create a matching fund for federal dollars to be used for the development of child care centers in rural Texas. Today, the mission of the Corporate Fund still includes creating economic support opportunities in rural communities. However, the mission is broader, now encompassing full community development. Through its statewide technical assistance grants, it offers CBOs support in the area of child care, community arts, parenting, advocacy, substance abuse prevention, and information and referral.

**Escuela de la Raza Unida (Blythe, CA)**

Founded in 1972, Escuela de la Raza Unida is a nonprofit, public benefit educational institution offering bilingual/bicultural education for grades K-12. Escuela is geared to meet the needs of farmworkers' children. It is one of a handful of autonomous, Chicano-operated alternative schools in the United States. Escuela also serves as a community-based organization in the Palo Verde Valley actively addressing the needs of the farmworker community. Its activities include: operation of a non-commercial and bilingual educational radio station; paralegal services; community organizing; and sponsorship of cultural events.

**Friendly House, Inc. (Phoenix, AZ)**

Friendly House, Inc. is a social service agency whose mission is to eliminate illiteracy among Hispanics. It is dedicated to the betterment of immigrants who reside in the South Phoenix area. Friendly House offers the following programs: immigration assistance, education, social services/counseling, youth programs, home/personal care, rehabilitation, information and referral services, and parenting skills training. In collaboration with NCLR's $C^2E^2$ program, Friendly House operates after school academic enrichment programs for elementary and junior high school students and education and literacy programs for their parents. Although the majority of its clients are of Hispanic origin, Friendly House offers its services to anyone in need.

**Greater Dallas Foundation, Inc. (Dallas, TX)**

Founded in 1981, the Greater Dallas Foundation, Inc. is a private, nonprofit corporation organized to facilitate the provision of legal assistance to underprivileged people who are unable to afford the services of a private attorney. The



Foundation works primarily to link disadvantaged clients with private attorneys, who are encouraged to take significant cases with the associated costs and/or legal fees underwritten by the Foundation. Community development activities are a new focus of the Foundation, which will work in housing, business, and community development. The Foundation also provides advocacy and youth leadership training.

**Guadalupe Center, Inc. (GCI) (Kansas City, MO)**

GCI is a community-based organization which seeks to serve the needs of the elderly, youth, and other residents of the Westside community, as well as Hispanics throughout the Kansas City metropolitan area. It provides comprehensive services including education, elderly services, day care, teen pregnancy services, recreation, and employment and training. It operates an alternative high school and helps operate a neighborhood parochial elementary school. In collaboration with NCLR's $C^2E^2$ program, GCI offers an *Academia del Pueblo* program for elementary school students and adult education activities for their families.

**Hispanic American Council, Inc. (Kalamazoo, MI)**

Founded in 1982, the Hispanic American Council, Inc. strives to advocate for the Hispanic population in southwest Michigan and to nourish and encourage their diverse cultural heritage within the larger community. The Council seeks to assist Hispanics in maintaining self-sufficiency and fostering social and economic well-being by concentrating on education, employment, and housing. Its services include immigration assistance, English-as-a-Second-Language (Family Reading Program), court interpretation, emergency interpretation, health referrals, food referrals, clothing, job placement, resume preparation, and housing referrals.

**Hispanic Coalition (Miami, FL)**

The Hispanic Coalition's purpose is to promote the unification and active participation of Hispanic organizations in Miami, to enable them to voice their needs and concerns in order to receive equal economic, social, political, and cultural benefits in the State of Florida. It provides community development, educational, professional/career development, employment and training, immigration services, and information and referral services.

**Housing for Mesa, Inc. (Mesa, AZ)**

Founded in 1988, Housing for Mesa, Inc. is a nonprofit, community-based housing development corporation that promotes the creation and preservation of permanent, affordable housing and provides housing support services for low-income families and individuals with children. Housing for Mesa has created a private/public partnership in which public resources, such as local Community Development Block Grants and state funds, are leveraged to bring in additional private resources and in-kind contributions from the community, including participation by local lending institutions. Current housing programs include: First-Time Homebuyer Program; substantial rehabilitation of existing homeownership housing units; and housing information and counseling services.

**Houston Community Services (Houston, TX)**

Houston Community Services was incorporated in 1975 with three primary missions: to operate a social service center, to provide cultural enrichment, and to carry out economic development. It provides a variety of services to the community, including notary, income tax preparation,



immigration services, and referral to jobs and other agencies in the Hispanic *barrio* of Houston.

**Humanidad, Inc. (Rocky Hill, CT)**

Founded in 1980, Humanidad, Inc. is a nonprofit agency which provides bilingual/bicultural educational and residential services, as well as advocacy and health care for persons with disabilities. Its services include residential management, nursing, educational, life domain and behavioral programs for person with developmental disabilities. Humanidad maintains five independent community residential homes in the greater Hartford region, each serving a small number of clients. Direct care is provided 24 hours a day by more than 30 full-time and part-time employees and contractors.

**La Causa, Inc. (Milwaukee, WI)**

Incorporated in 1972, La Causa, Inc. serves over 4,000 children, adults, and families each year. La Causa's services include a Pre-College Education Center for adults, Family Resource Center, Learnfare, Parental and Family Responsibility consortium, Crisis Nursery, Satellite Homes, Nurturing Program, Respite for Special Needs Children, day care, Head Start, kindergarten, Hispanic Early Learning Program, and foster care.

**Latin American Professional Women's Association (LAPWA) (Los Angeles, CA)**

LAPWA, which originated from the Los Angeles Bilingual Secretaries Association in 1975, provides a mutual support group for Latinas working to enrich themselves vocationally, educationally, and culturally. It achieves this through different programs, such as a scholarship fund for

Latinas who are heads of household over the age of 25 and in college; a "Hermanita/Little Sisters Program," a project that matches Latina "Big Sister" companions with young Latinas; and a series of educational and informative speakers.

**Latin Americans for Social and Economic Development, Inc. (LA SED) (Detroit, MI)**

Founded in 1969, LA SED promotes social and economic development of the Hispanic community and all residents of Southwest Detroit. It provides employment and training, weatherization/energy information and referral, educational services and advocacy, as well as senior citizen and youth services. LA SED sponsors and coordinates an annual "Yuletide Fiesta" which supplies food, toys, and clothing to the needy during the Christmas season.

**Latino Family Services (Detroit, MI)**

Latino Family Services is an organization that provides a wide range of family and youth services to Latinos and other residents of the Hispanic *barrio* of Detroit. It operates a substance abuse center, and provides alcohol/drug counseling, AIDS education and testing, counseling and referral, therapeutic and support groups, and in-school and summer youth prevention activities.

**LEARN, Inc. Educational Talent Search (Lubbock, TX)**

LEARN, Inc. Educational Talent Search is an organization designed to assist individuals who have academic potential to enter or re-enter programs of secondary and post-secondary education. LEARN's participants come from many cultural backgrounds and span a wide range from youth to the elderly. Its services include counseling students about vocational, academic, and career choices; helping in the



application process for admissions; ACT and SAT registration; and housing and financial aid.

**Mexican American Commission (Lincoln, NE)**

The Mexican American Commission is a statewide Governor-appointed Board whose mission is to advocate on behalf of the Hispanic community within the State of Nebraska in the areas of employment, health, education, housing, welfare, social adjustment, and other conditions pertaining to the general welfare of Hispanics. The Commission closely follows legislation in Nebraska to promote favorable laws and to oppose laws detrimental to the Hispanic community.

**The Mexican Community Committee of South Chicago (MCC) (Chicago, IL)**

Founded in 1959, MCC offers educational programs, counseling, organized sports, and cultural activities in order to enhance the well being of the youth and families of Southeast Chicago. By providing advocacy programs with youth-serving agencies in the community, MCC works actively to prevent juvenile delinquency. MCC also offers job development, bilingual educational support, a dropout prevention program, and extensive family counseling. MCC encourages community residents to volunteer in agency programs to promote pride in the community.

**NAF Multicultural Human Development, Inc. (NAF) (North Platte, NE)**

Founded in 1979, NAF is a statewide organization that serves communities in 93 Nebraska counties with the purpose of promoting economic self-sufficiency, social, and physical well-being. Through its seven regional offices, NAF provides services which include: Adult Basic Education (includes

English-as-a-Second-Language and GED preparation); vocational/occupational training; on-the-job training; counseling and referrals to employment; supportive and emergency services; outreach to and health services for migrants, seasonal farmworkers, and low-income women and children; HIV/AIDS and substance abuse education and prevention; advocacy and translation; and assistance with family immigration benefits.

**National Asian Pacific Center on Aging (NAPCA) (Seattle, WA)**

NAPCA represents Asian/Pacific Islander elders at the national level, preparing policy recommendations to improve awareness, access, and utilization of services. In addition, NAPCA networks with Asian/Pacific Islander community-based service providers and mainstream aging organizations to enhance the capabilities of Asian Pacific communities to meet the needs of their elderly through strong formal and informal support.

**Northwest Communities Education Center (NCEC) (Granger, WA)**

NCEC is a minority community-based organization which focuses its efforts on responding to the cultural, educational, and informational isolation of the Hispanic/Latino and other disadvantaged communities. NCEC, through its radio station, produces radio programming to help such communities overcome barriers of illiteracy, language, discrimination, poverty, and illness.

**El Proyecto del Barrio, Inc. (Arleta, CA)**

Founded in 1970, El Proyecto del Barrio, Inc. is a nonprofit organization providing bilingual/bicultural



comprehensive community services and advocacy in the areas of: drug/alcohol prevention and treatment; job training and employment; primary health care; and education. The primary target population is Latino and other economically disadvantaged youth and adults in the San Fernando Valley. El Proyecto's programs and services include: health education, family health care clinics, a prenatal service center, youth services, an early intervention program, an outpatient drug free program, a community resource center, and an employment and training program.

**Rural Opportunities, Inc. (Rochester, NY)**

Rural Opportunities, Inc., is a multistate, nonprofit corporation, organized in 1969 to provide services to and advocate on behalf of migrant and seasonal farmworkers and rural disadvantaged individuals. Its mission is the improvement of the lives and living conditions of its constituency through self-help and advocacy. Rural Opportunities, Inc. offers programs in adult employment, health and safety services, affordable housing development, business and economic development, children and youth services, participant support, advocacy, and employer assistance programs.

**Servicios de La Raza, Inc. (Denver, CO)**

Servicios de La Raza, Inc., established in 1972, is a state-licensed, bilingual, human services organization. Its mission is to provide and advocate for comprehensive, culturally-relevant human services for the Spanish-speaking population of Denver, Colorado. Mental health, alcohol treatment, youth development, employment training, and a variety of basic emergency services are provided in an integrated, comprehensive manner.

**Southwest Key Program (Austin, TX)**

Founded in 1987, the Southwest Key Program is a private, nonprofit agency which operates 23 community-based treatment programs for delinquent youth and their families in major cities across Texas and Arizona. It has designed and implemented innovative program models for federal, state, and local agencies, and currently operates seven different program models. Programs include an outreach and tracking program; day treatment; residential treatment centers; in-home services for abused and neglected youth; a program for runaways; a family preservation program; and a program which provides services to delinquent youth and their families from the time they are incarcerated in state institutions to their eventual release to standard parole.

**Spanish Speaking Council of Reading and Berks County (Reading, PA)**

The Spanish Speaking Council of Reading and Berks County, founded in 1977, serves the needs of the low-income and Hispanic community of Reading and Berks County in Pennsylvania. The center is a multiservice provider striving to promote individual self-sufficiency, a strong family, and a cohesive community by providing programs such as education; support for the elderly; an escort service; housing rehabilitation; drug education; AIDS prevention education; child abuse advocacy; youth violence prevention; and presentations through radio (*La Voz Latina*) and television (*Hispanic Center Presents*).

**Spanish Theater Repertory Co., Ltd. (Repertorio Espanol) (New York, NY)**

Founded in 1968, *Repertorio Espanol* serves as a catalyst for cultural exchange between Spanish-speaking and



English-speaking Americans, as well as between the United States and its nearest neighbors, by bringing theater to a broad audience in New York City and across the country. *Repertorio Espanol* offers the best of Latin American, Spanish, and Hispanic-American theater in distinctive, quality productions while working to create a professional company of actors, singers, musicians, and directors who perform in the Spanish language.

**Sparks Housing Development Corporation (El Paso, TX)**

Founded in 1979, Sparks Housing Development Corporation is a community organization made up of residents of the Sparks *colonia*. The organization represents residents in their efforts to improve living conditions by getting water, electric, and other services to the area. Sparks also assists residents who do not speak or understand English with needs such as applications for services.

**Student Alternatives Program, Inc. (San Antonio, TX)**

Founded in 1990, Student Alternatives Program, Inc. is a nonprofit organization which plans, develops, and implements curriculum and instructional services for at-risk and dropout youth from the ages of 14-21 through performance-based contracts with school districts in the State of Texas. The curriculum includes the essential elements required for students to attain their high school diploma from the participating school districts. GED instruction is also provided. The organization has 24 instructional centers throughout the state, representing 28 school districts.

**Tejano Center for Community Concerns, Inc. (TCCC) (Houston, TX)**

Founded in 1992, TCCC is a community-based, nonprofit agency whose mission is to improve opportunities for Hispanics through the provision of educational, social, housing, and economic development initiatives. It operates youth violence prevention programs, ABC/ESL classes, drug abuse and AIDS prevention, and gang intervention and prevention. TCCC is also developing a foster care group home and shelter, organizing resident and homeowner groups, and beginning a home ownership program for low-income families. Ten single family homes were built in 1995 and 50 single family units are projected for 1996. The newest initiative of TCCC is the Raul Yzaguirre Charter School for Success, which targets Hispanic 7th and 8th grade students and will feature one of the most creative and individualized education programs for middle school youth in the country.

**Texas Enterprise for Housing Development, Inc. (TEHDI) (Mission, TX)**

TEHDI was incorporated in 1991 to develop affordable housing programs in the South Texas area. TEHDI develops multi-family units for very low-income families through the acquisition of Resolution Trust Corporation single family units, and generating new multi-family units. TEHDI also sponsors an affordable home ownership program for low-income families.

**Valle del Sol, Inc. (Phoenix, AZ)**

Founded in 1970, Valle del Sol's mission is to empower its community through advocacy and a continuum of culturally sensitive health services, partnerships, and social services. Programs include substance abuse prevention and



treatment, and a wide range of counseling services for youth and families. Valle del Sol is the founder of the Hispanic Leadership Institute of Phoenix, now operating in partnership with Arizona State University. Valle del Sol also helps provide medical services in conjunction with local hospitals.

**Washington Alliance for Immigrant and Refugee Justice (Seattle, WA)**

The Washington Alliance for Immigrant and Refugee Justice is an alliance of community-based organizations and individuals dedicated to upholding human and civil rights for all immigrants and refugees. The Alliance pursues its mission through community empowerment, public education, political advocacy, and direct action. The work of the Alliance is guided by a nine-member steering committee, which includes representatives of community-based, labor, religious, student, educational, social service, and legal advocacy organizations.

**Westside Housing Organization (WHO) (Kansas City, MO)**

Founded in 1973, WHO is a nonprofit community development corporation whose mission is to provide decent, safe, and affordable housing in the Westside. WHO programs have included substantial and moderate rehabilitation, minor and emergency repairs, energy conservation improvements, a tool lending library, contractor assistance and referrals, and technical assistance on repairs for residents. WHO has been involved in the community as a local rental manager for over 13 years, and is also involved in the development, ownership, and management of rental properties.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

*ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,*

*Petitioners,*

v.

*STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; and ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,*

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICUS CURIAE

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. Language discrimination has adversely affected Latinos in many areas, such as education, employment, and voting rights. "Official English" and English-only laws epitomize such discrimination, and MALDEF has taken a strong role in opposing such measures. MALDEF thus has a strong interest in this case.

This brief addresses the first question set forth in the Court's Order of March 25, 1996: "Do petitioners have standing to maintain this action?" *JA.* at 212. MALDEF respectfully submits that this question has not been adequately addressed by the Petitioners, by the Respondents, or by the parties' various *amici curiae*. All parties have consented to the filing of this brief. Letters of consent have been filed with the Court.

Should the Court disagree with *amicus* that Petitioners lack standing to maintain this action and should the Court reach the merits, MALDEF urges the Court to affirm the decision of the Ninth Circuit Court of Appeals.

## STATEMENT OF THE CASE

While several Respondents do question Petitioners' Article III standing in this case, none of the briefs adequately addresses the record or relevant facts pertaining to the issue. *Amicus curiae* accordingly does so here.

Following the District Court's decision on the merits of this case declaring Article XXVIII unconstitutional, 730 F. Supp. 309 (D. Ariz. 1990), Governor Mofford, the only

remaining defendant, announced that she would not appeal the court's decision, and, in fact, she never did appeal.

Ten days after the District Court's decision on the merits, Petitioners Arizonans for Official English ("AOE") and Robert D. Park filed a motion to intervene. *J.A.* at 94. The motion was supported by a single affidavit -- that of Robert D. Park. *Mot. to Intervene, Ex. B, Aff. of Robert D. Park (Feb. 12, 1990)* (hereinafter *Park Aff.*). Park stated that he had been a resident of Prescott, Arizona, "for over ten years," and he also stated in relevant part:

> I was and still am Chairman of the Arizonans for Official English Committee.
>
> I solicited signatures for petitions to place the initiative for a constitutional amendment upon the ballot, campaigned for and voted for what the voters passed in 1988 as the Amendment XXVIII to the Arizona Constitution.
>
> The Committee expended in excess of $307,000.00 to obtain signatures to place the initiative on the ballot and promote the passage of it. The Committee is backed by 9,769 U.S. English members in Arizona. The Committee was the sole organization gathering signatures to place the initiative measure on the ballot, more than 1,000 volunteers gathered signatures for the Committee. The Committee gathered more than 200,000 signatures.
>
> I believe that Amendment should remain part of the Arizona Constitution because the voters of the State of Arizona determined that it should be part of that Constitution. If the Committee and Park are not allowed to intervene in this case and appeal the decision holding the Amendment unconstitutional, all that effort and expense will have been wasted.
>
> • • •
>
> The Committee and I believe the Governor has a duty to appeal from the court's decision in this matter under the oath of office to which she swore which is set forth at Arizona Revised Statutes § 38-231. The failure and refusal of Governor Mofford to do so is the reason for this motion to intervene in order to appeal.

*Park Aff.* at 1-3 (paragraphs omitted and asterisks added).

Park in his affidavit provided no further description or characterization of AOE. Nevertheless, the District Court, in its decision denying intervention, characterized AOE as "the main proponent of the initiative that placed Article XXVIII on the ballot." *J.A.* at 142.[1]

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[1] This is supported in the record by Park's statement that AOE "was the sole organization gathering signatures to place the initiative measure on the ballot." *Park Aff.* at 2. Not revealed in Park's affidavit, however, is the fact that the volunteer circulators who gathered the petition signatures were *paid* to gather the signatures. According to the U.P.I. wire service, "American Petition Consultants, of Sacramento, Calif." was paid "up to one dollar per signature" and circulators "received 35 cents per signature, but were eligible for 'quantity' bonuses of up to 55 cents per name." *United Press International, Regional News, Arizona-Nevada, Dateline Phoenix, July 6, 1988.* Although the record does not disclose how much was paid to the individual circulators, public documents reveal that AOE paid

(continued...)

Apart from the brief references in Park's affidavit, there is no evidence in the record as to exactly what kind of an organization the Arizonans for Official English Committee was or is. This led the District Court, during argument on the motion to intervene, to ask counsel for Petitioners, "What kind of an organization is the Committee?" *J.A.* at 127. Counsel responded that it was a "political action committee which was instituted for the purpose of circulating petitions to get this initiative on the ballot." *Id.*

The District Court followed up by asking, "Unincorporated association, is that it?" to which counsel replied, "Yes." *Id.*[2] Petitioners similarly have represented to this Court that AOE "is an unincorporated association and has no parents or subsidiaries." *Pet'r Br.* at ii.

As to whether AOE is a membership organization, nothing in the record establishes this as fact. To the contrary, Park stated in his affidavit only that AOE was "backed" by the members of another group, a national organization known as U.S. English: "The Committee is backed by 9,769 U.S. English members in Arizona." *Park Aff.* at 2.

Although there was nothing else in the record before the District Court about the relationship between AOE and

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[1](...continued)
$111,142 to American Petition Consultants for "[s]ignature and petition expenses." *Arizonans for Official English, Statement of Contributions, State of Arizona* (hereinafter *AOE 1988 Contribs. Statement*), at Schedule D, p. 5 (Sept. 1, 1988) (brackets added).

[2] The District Court was troubled by the status of AOE as an unincorporated association, raising questions about its capacity to be a litigant. *See J.A.* at 133, 142-43. Despite its reservations, the District Court denied intervention on other grounds. *See infra.*



the national organization known as U.S. English (or as U.S. English Foundation, Inc.[3]), it is a matter of public record that AOE is quite close to U.S. English and to its lobbying arm, the U.S. English Legislative Task Force, all of whom contributed to and lobbied for the English-only ballot initiative in Arizona that became Article XXVIII.

U.S. English official Cameron Whitman, in an affidavit filed in the Ninth Circuit, described U.S. English as "the largest organization promoting English as the official language of the United States," and as having "actively promoted and supported the fourteen [state] constitutional amendments and statutes declaring English the official languages [sic]" enacted since 1983. *Aff. of Cameron Whitman, at 1 (May 3, 1990), J.A.* at 153. U.S. English itself has represented to this Court that it is a nationwide membership organization which "assisted in the initiative" that became Article XXVIII. *Br. of U.S. English Amicus Curiae* at 1.

During calendar year 1988 -- the year in which the English-only initiative qualified for and appeared on the Arizona ballot, U.S. English contributed $285,000 to its lobbying arm, the U.S. English Legislative Task Force ("Task Force"). *U.S. English Found., Inc., IRS Form 990, Calendar Year 1988, at Unclassified Schedule IV (Nov. 14, 1989).*

During the following year, 1989, U.S. English contributed $145,000 to the Task Force. *U.S. English Found., Inc., IRS Form 990, Calendar Year 1989, at Schedule A, p. 5 (Nov. 12, 1990).* As U.S. English explained this transfer of funds, "U.S. English Foundation gave a lobbying grant to the

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[3] In its 1988 federal tax return, the U.S. English Foundation, Inc., explained: "On July 1, 1988, all assets and liabilities of U.S. English <a project of U.S.> were transferred to U.S. English Foundation, Inc." *U.S. English Found., Inc., IRS Form 990, Calendar Year 1988, at Unclassified Schedule I (Nov. 14, 1989).*

Task Force." *Id.* This $145,000 lobbying grant from U.S. English constituted more than 99% of the contributions and grants received by the Task Force that year, as it received only $310 in additional contributions and grants. *U.S. English Legis. Task Force, Inc., IRS Form 990, Calendar Year 1989, at 1 (Nov. 15, 1990).*

The relationship between U.S. English and the Task Force is not limited to the former funding the latter, as they "have common control": "More than 25% of the directors sit on each board. They also have a historic and continuing relationship, participating in joint work efforts." *U.S. English Found., Inc., IRS Form 990, Calendar Year 1989, at Schedule A, p. 5 (Nov. 12, 1990).*

According to the Task Force, its nearly-exclusive work effort or program service is: "Lobbying to promote the adoption of the English language as the 'official' language of the United States." *U.S. English Legis. Task Force, Inc., IRS Form 990, Calendar Year 1989, at 2 (Nov. 15, 1990).*

AOE fits neatly into this web in part as a recipient of funding primarily from the Task Force and also somewhat from U.S. English itself. For example, AOE reported to the State of Arizona in 1988 that it had received $157,246 in contributions from all sources from January 1, 1988 through August 24, 1988, covering most of the period during which Petitioner sought to qualify the English-only initiative for the statewide ballot. *AOE 1988 Contribs. Statement*, at 1. Of this total of $157,246 in contributions, AOE received $154,864 from the Task Force. *Id. at Schedule B & Schedule G.*[4]

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[4] During this time period, AOE paid American Petition Consultants more than $110,000 for signature and petition expenses. *See supra* note 1. Also on the expenditure side in this period, AOE paid $7,190 to the Task Force for "[t]ravel and misc. expenditures." *AOE 1988 Contribs. Statement, at Schedule D, p. 5.*



For all of calendar year 1988, AOE received a total of $306,756 in contributions; $304,344 of this sum -- more than 99% of the total -- was received from the Task Force. *Arizonans for Official English, Statement of Contributions, at Schedule B & Schedule G (March 24, 1989).*[5]

Petitioner Robert D. Park also was tightly tied into this interlocking web connecting AOE, the Task Force, and U.S. English. During 1988 and through at least February 12, 1990, Park of course served as Chairman of AOE. *Park Aff. at 1.* In 1988 and 1989, Park served as one of the three Directors of the Task Force. *U.S. English Legis. Task Force, Inc., IRS Form 990, Calendar Year 1988, at 4 (Nov. 14, 1989); U.S. English Legis. Task Force, Inc., IRS Form 990, Calendar Year 1989, at 4 (Nov. 15, 1990).* In 1990, Park became a Director of U.S. English. *U.S. English Found., Inc., IRS Form 990, Calendar Year 1990, at Statement 4 (Nov. 15, 1991).*

Although little of the foregoing was brought to the attention of the District Court in this case, the court nevertheless denied Petitioners' motion to intervene in part on the grounds that AOE and Park did not satisfy the injury-in-fact requirement necessary for there to be a justiciable controversy under Article III of the U.S. Constitution. *J.A.* at 133-37, 142-49, 130 F.R.D. 410 (D. Ariz. 1990).[6]

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[5] In the following year -- calendar year 1990 -- U.S. English contributed $33,000 directly to Arizonans for Official English. *U.S. English Found., Inc., IRS Form 990, Calendar Year 1990, at Statement 5 (Nov. 15, 1991).*

[6] Attorney General Robert Corbin, who earlier had sought and won dismissal as a party defendant, reversed his position and sought to intervene under 28 U.S.C. § 2403(b), which allows intervention by a state attorney general in an action in which an "officer" of the state "is not a party." The District Court denied this

(continued...)

On appeal, a Ninth Circuit panel reversed. *J.A.* at 157, 939 F.2d 727 (9th Cir. 1991). According to the Ninth Circuit, which cited and purported to rely on *Diamond v. Charles*, 476 U.S. 54 (1986), and on *Karcher v. May*, 484 U.S. 72 (1987), both AOE and Park have Article III standing.

Both AOE and Park, the Ninth Circuit assumed and asserted, performed roles in the Arizona ballot initiative process closely analogous to that of a state legislature. *See J.A.* at 165, 939 F.2d at 732. Ultimately, the Ninth Circuit ruled that only AOE, in the context of a state ballot initiative, was analogous to a state legislature, and thus had Article III standing. *See J.A.* at 167, 939 F.2d at 733.

The Ninth Circuit also ruled that AOE's Robert Park had Article III standing to appeal the District Court's ruling on the merits. The court premised this conclusion on the fact that section 4 of Article XXVIII confers "standing" upon "a person who resides in or does business in this State . . . to bring suit to enforce this Article in a court of record of the State," *J.A.* at 25; on the possibility "that Park *could* have sued Yniguez to enforce" Article XXVIII; on the assertion by AOE and Park that they had been told this lawsuit was being defended by the Attorney General;[7] and on

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[6](...continued)
§ 2403(b) motion on the grounds that Governor Mofford obviously was "a party" to this action. *J.A.* at 132, 141.

[7] The only reference to such a matter in the record is a somewhat different statement by Park in his affidavit:

> Neither the Committee nor I attempted to intervene earlier in this action because the Amendment was being defended by the Attorney General of the State of Arizona and his assistants.
>
> (continued...)



the unsupported conclusion that plaintiff "Yniguez could have had a reasonable expectation that Park (and possibly AOE as well) would bring an enforcement action against her." *J.A.* at 169-71 (emphasis added), 939 F.2d at 734.[8]

Additional proceedings occurred, leading to the Ninth Circuit's *en banc* decision on the merits now under review.

## SUMMARY OF ARGUMENT

A. As lobbyists -- like most other lobbyists -- AOE and Park concededly have strong value interests in any litigation which may have a potentially negative effect on a law for which they lobbied. But Petitioners' personal and professional value interests in defending the ballot initiative they supported and lobbied for are not sufficient to confer Article III case-or-controversy standing. *Diamond v. Charles*, 476 U.S. 54, 66-67 (1986); *cf. Sierra Club v. Morton*, 405 U.S. 727 (1972) (heightened interest and historic commitment irrelevant to standing). Nor may AOE and Park be deemed to have suffered any injury-in-fact by virtue of their alleged financial loss, given that the loss was not caused by the initiative as adopted, but instead involved time and money that they voluntarily expended in lobbying for the initiative.

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[7](...continued)
> Thus our rights and interests were being protected by such representation and separate representation would have been duplicative and contrary to judicial economy.

*Park Aff.* at 3.

[8] Contrary to the Ninth Circuit's speculation, there is nothing anywhere in the record indicating that AOE or Park ever even contemplated filing suit against the Arizona, much less against plaintiff Yniguez.

B. In *Karcher v. May*, 484 U.S. 72 (1987), this Court recognized that a state legislature, as well as the elected heads of the legislature authorized to act on its behalf, have standing to defend a law that the legislature enacted. *Karcher*, however, lends no support to Petitioners' standing here.

1. AOE and Park, in the context of a state initiative, cannot be characterized by analogy as a legislature, given that the legislature here was comprised of all the registered voters of Arizona, or at least the more than one million Arizonans who voted upon the English-only initiative.

2. Nor can lobbyists AOE or Park be characterized as the authorized representative of the voter-legislators. AOE was not even a voter in this "voter-legislature." And AOE and Park had none of the characteristics of the elected legislative leaders who defended the legislatively enacted law in *Karcher*, and whose elected replacements in office were recognized by this Court as the appropriate parties to withdraw the appeal.

C. Even if precedent allowed the expansion of *Karcher* to encompass some degree of legislator standing, and even if the Court were inclined to extend that concept to the initiative context with regard to voter-legislators, this Court's decision in *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986), precludes such a result. In *Bender*, where the full school board unsuccessfully defended its challenged policy and then declined to appeal, this Court ruled that the sole dissenting board member did not have Article III standing to appeal on his own.

D. Finally, standing may not be conferred on Petitioners by virtue of Article XXVIII's authorization of a private right of action in state court. A similar authorization -- allowing taxpayer lawsuits -- was long ago rejected by this Court and deemed insufficient to confer case-or-controversy



standing. *Flast v. Cohen*, 392 U.S. 83 (1968). This Court, in fact, has long denied standing to mere residents, citizens, taxpayers, and private-attorneys-general even where standing has been state-conferred. *Doremus v. Board of Educ. of Hawthorne*, 342 U.S. 429 (1952).

## ARGUMENT

### A. Petitioners Suffered No Injury in Fact, But Instead Asserted Lobbyists' Mere Value Interests, Which Are Insufficient to Confer Article III Standing

The posture of this case is nearly identical to that in *Diamond v. Charles*, 476 U.S. 54 (1986). This Court's decision in *Diamond* compels the denial of standing to AOE and Park here. Petitioners seek to vindicate mere value interests. Even if -- as professional lobbyists -- they collected and expended substantial amounts of money to vindicate their particular value interests, that fact cannot convert the interests into a direct and concrete stake in this action.

In *Diamond*, after Illinois declined to appeal a lower court decision holding portions of a state abortion law unconstitutional, defendant-intervenor Diamond sought review by this Court "based upon his personal status as a doctor, a father, and a protector of the unborn." *Id.* at 66. In the course of "reject[ing] Diamond's claims that his personal and professional interests confer standing," the Court stated:

> Although Diamond's allegations may be cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the Illinois Abortion Law as written be obeyed. Article III requires more than a desire to vindicate value interests. It requires an "'injury in fact'"

> that distinguishes "a person with a direct stake in the outcome of a litigation -- even though small -- from a person with a mere interest in the problem." Diamond has an interest, but no direct stake, in the abortion process. This "abstract concern . . . does not substitute for the concrete injury required by Art. III."

*Id.* at 66-67 (ellipsis by Court), *citing United States v. SCRAP*, 412 U.S. 669, 687, 689 (1973), *and Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

The Court further characterized "Diamond's attempt to maintain the litigation" after the state had abandoned it as "simply an effort to compel the State to enact a code in accord with Diamond's interests." *Diamond*, 476 U.S. at 65. The Court concluded that, "[b]ecause the State alone is entitled to create a legal code, only the State has the kind of 'direct stake'" required for Article III standing. *Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)).

The Court in *Diamond* additionally rejected as injury-in-fact Diamond's financial loss from an assessment of attorney's fees against him. The Court concluded that any financial loss was a "consequence" of Diamond's voluntary decision to intervene rather than an injury that could "fairly be traced to the Illinois Abortion Law" itself. *Diamond*, 476 U.S. at 70.

The interests that AOE and Park assert here are of essentially the same nature as the value interests asserted by Dr. Diamond. As Park stated in his affidavit: "I believe that Amendment should remain part of the Arizona Constitution because the voters of the State of Arizona determined that it should be part of that Constitution." *Park Aff.* at 2.

Like Dr. Diamond's asserted interests, the interests of AOE and Park are purely value-based interests -- their desire



to see the state enact and enforce a law against the use of languages other than English. They have never alleged any interest other than the desire to vindicate this particular value belief; neither protector of English has ever shown how the non-enforcement of Article XXVIII harms them in any way other than in their value sensibilities.

AOE and Park have, however, often referred to their lobbying expenditures as a direct and concrete injury. They claim that all of their "effort and expense will have been wasted" unless they are permitted to defend Article XXVIII. *Park Aff.* at 2. They assert that this "nullification of AOE's efforts creates injury."[9] *Pet'r Br.* at 46.

But, all that these efforts prove is that AOE and Park promoted their value beliefs to a greater extent than many others. Thus, they are active, *lobbyist* value holders rather than passive value holders. That they collected and expended large amounts of money merely means that they are professional lobbyists. Still, at bottom, their lobbyist interest is no less a value interest than Dr. Diamond's.

This Court long ago rejected prominence, long establishment, or great expenditure as a basis for distinguishing the standing of value promoters. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Court rejected the standing of the Sierra Club, concluding that "a mere 'interest in a problem,' no matter how longstanding the interest and

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[9] In addition to the defects identified here, Petitioners' nullification theory likely could not survive another test of standing doctrine. Because this case involves a substantive challenge to Article XXVIII rather than a procedural challenge to the manner of its adoption, it is doubtful that there is a sufficient nexus between the declaration that the law is substantively unconstitutional and the alleged "nullification" of AOE's and Park's lobbying efforts and expenditures. *See Flast v. Cohen*, 392 U.S. 83, 102 (1968) (explaining nexus requirement).

no matter how qualified the organization is in evaluating the problem, is not sufficient" to grant standing. *Id.* at 739.[10] The Court's explanation demonstrates why AOE's and Park's status as established, professional lobbyists cannot distinguish them from Dr. Diamond:

> The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona-fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

*Id.* at 739-40.

AOE and Park are certainly no larger, well-established, or more committed to their cause than the Sierra Club is to its cause. What applied to the Sierra Club applies with equivalent force to AOE and Park.

In contrast, under the theory urged by AOE and Park, any lobbyist who expended any amount of effort or money on promoting a law could intervene to defend that law. As explained in *Sierra Club*, this right to intervene could

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[10] Although the Court was construing standing under the Administrative Procedure Act, its discussion in *Sierra Club* is equally applicable to Article III standing.



not be limited to expert organizations or prominent organizations. Anyone who engaged in any amount of lobbying could gain access to the federal courts. The mere writing of a letter to a congressperson or state legislator would qualify an individual to defend a law that he or she supported.

But, the Court's well-established doctrines of standing foreclose this result. *Diamond* itself rejects the idea that lobbying expenditures can support Article III standing. The Court characterized Dr. Diamond's intervention in the litigation itself as a voluntary lobbying effort -- "an effort to compel the State to enact a code in accord with Diamond's interests." 476 U.S. at 65. The Court then rejected Diamond's financial loss from that lobbying effort -- in the form of an award of attorney's fees -- as a basis for standing. AOE and Park are wholly indistinguishable from Dr. Diamond.

### B. Petitioners Are Not At All Akin to a Legislature

In further support of their standing, AOE and Park assert that, in the context of voter-enacted initiatives, they are like a state legislature. The Ninth Circuit similarly concluded as to AOE and Park:

> As the principal sponsors of Article XXVIII, their relationship to Article XXVIII is closely analogous to the relationship of a state legislature to a state statute.

*J.A.* at 165, 939 F.2d at 732. Relying on this Court's decision in *Karcher v. May*, 484 U.S. 72 (1987), the Ninth Circuit conferred standing on AOE, concluding that AOE "stands in an analogous position to a state legislature." *J.A.* at 167, 939 F.2d at 733. That analogy fails. AOE and Park are neither the Arizona state legislature nor its authorized representatives with regard to Article XXVIII.

In *Karcher*, when the state Attorney General declined to present a defense, New Jersey General Assembly Speaker Alan Karcher and Senate President Carmen Orechio intervened to defend the constitutionality of a public school minute-of-silence statute enacted by their legislative bodies. Karcher and Orechio, unsuccessful in the lower courts, sought review in this Court. However, by that time, the two had lost their legislative leadership positions. Their successors as Speaker and Senate President withdrew the legislature's appeal, but Karcher and Orechio sought to pursue the appeal as individual legislators. *Karcher*, 484 U.S. at 76, 78. Recognizing that the former legislative leaders had intervened in their official capacities on behalf of the legislature as a whole, this Court dismissed the appeal, holding that "[t]he controversy ended when the losing party -- the New Jersey Legislature -- declined to pursue its appeal." *Id.* at 83.

In his concurring opinion, Justice White pointed out what the Court's decision meant: "that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court." *Id.* at 84 (White, J., concurring in the judgment). Justice White also made explicit what had *not* been decided: "we again leave for another day the issue whether individual legislators have standing to intervene and defend legislation for which they voted." *Id.* at 84-85.

Thus, like prior Court decisions, *Karcher* merely establishes that a state legislature may defend the laws it enacts. *See Burke v. Barnes*, 479 U.S. 361, 364 n.* (1987) (assuming arguendo that house of Congress has standing when law it passed is nullified by executive action); *Coleman v. Miller*, 307 U.S. 433 (1939) (state senate standing). The *Karcher* Court did not decide whether any individual legislator or group of legislators have the same right; nor



does it at all address who may defend a voter initiative or referendum.[11]

The *Karcher* decision does not confer standing on AOE or Park here. Neither does the decision's reasoning persuade by analogy or otherwise that these Petitioners ought to be allowed to defend Article XXVIII.

A legislature consists of the *entire* body of individual legislators who vote on the enactment of laws. In the unique context of voter initiatives, only the body of all voters parallels the legislature. Thus, the "legislature" that enacted Article XXVIII includes over one million voters who cast ballots in Arizona's November 1988 general election. Neither AOE -- which is not even a voter or a membership organization, and therefore not even a member of the "legislature" that enacted Article XXVIII -- nor Park, alone or together, could have enacted this initiative. Only the votes of more than half of the one million voters -- each "yes" voter with an individual reason for voting as he or she did -- could have enacted Arizona's 1988 constitutional amendment. AOE and Park thus are not at all analogous to the "legislature" for purposes of Article XXVIII.[12]

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[11] Of course, as the state of Arizona points out in its brief, the Court previously summarily dismissed at least one case filed by an initiative sponsor because "it appear[s] appellant lacks standing to bring this appeal." *Don't Bankrupt Washington Comm. v. Continental Ill. Nat'l Bank & Trust Co. of Chicago*, 460 U.S. 1077 (1983).

[12] In *Coleman v. Miller*, the Court conferred standing on twenty members of the Kansas state senate -- who made up half of that body and included all of the senators who voted against the resolution whose validity they challenged. 307 U.S. at 438. Here, AOE and Park not only cannot claim to be the entire Arizona voter-legislature, they also cannot claim to be the body of all voters who supported Article XXVIII's enactment.

(continued...)

Of course, the *Karcher* decision does permit a state legislature to appear in court through its duly-elected leadership -- "its authorized representative," in Justice White's words. AOE and Park assert that they are the "authorized representatives" of the Arizona voter-legislature by virtue of the "specific duties and rights prescribed" by Arizona law for initiative sponsors. *Pet'r Br.* at 43. But, these rights and duties -- to file an application, to comply with regulations in circulating a petition, and to work in explaining the measure to voters -- are not the characteristics of true legislative leaders like Speaker Karcher and Senate President Orechio in *Karcher*.

Instead, Arizona's statutory prescriptions and proscriptions are precisely the kinds of regulations endured and rights enjoyed by all sorts of state and federal lobbyists. Lobbyists can and do draft legislation, they can and do explain their proposals to legislators, and they can and do urge the legislators' support. In exchange, they must typically register as lobbyists and subject themselves to appropriate government regulation. *See, e.g.,* Ariz. Rev. Stat. §§ 41-1231 to 1239 (registration and other lobbyist regulations.) However, that hardly means that lobbyists should be permitted to pose as "authorized representatives" of the legislature in defending laws once passed.

In *Karcher* itself, none of the characteristics that distinguish AOE and Park from any other Arizonan was relevant in identifying the "authorized representatives" of the New Jersey Legislature. Nothing in the case remotely suggests that "authorized" leaders must have authored the

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[12](...continued)

It is also worth noting that *Coleman* involved a challenge to the procedure by which the challenged resolution was declared enacted, rather than the substantive legality of the measure. This distinction may render *Coleman* inapposite in a case like this one regarding the substantive validity of a measure.



legislation at issue or even have voted in favor of it. If those were in fact prerequisites for "authorized representatives," then Karcher's and Orechio's duly-elected successors as Speaker and Senate President would have been, in all likelihood, inappropriate replacements for the former leaders in the litigation challenging the minute-of-silence law. Yet, the Court quite easily concluded that those successors had the sole right to withdraw the New Jersey Legislature's appeal.

It was neither authorship nor support for specific legislation that identified Karcher, Orechio and their successors as "authorized representatives" of the state legislature. Rather, it was their status as Speaker and Senate President -- the duly elected leaders *for all purposes* of the legislative houses. In clear contrast, neither AOE nor Park is an elected leader for any purpose, much less for all purposes, of the body of Arizona voters. A majority of Arizona voters in the 1988 general election did choose to enact a law proposed by AOE and Park, but those voters were never asked whether AOE and Park should act as their leaders or "authorized representative" for any purpose, including defending Article XXVIII.

Had the voters been presented that question, it is far from clear that a substantial number -- or, indeed, any -- of those who voted in favor of Article XXVIII would also have chosen AOE and Park to represent them in defending the law. If asked, some of the "yes" voters might well have concluded that no defense should be mounted at all -- they might have voted for the constitutional amendment for some purpose other than seeing it enforced. *See, e.g.,* Daniel Weintraub, *Crime, Immigration Issues Helped Wilson; Proposition 187 Wins Among Whites, But Loses Among All Other Ethnic Groups, Exit Survey Shows*, L. A. Times, Nov. 9, 1994 (seventy-seven percent of the those who voted for California Proposition 187 indicated they wanted to send "protest message" to federal government). Others might wish

to see Article XXVIII enforced or defended from challenge in some manner radically different from that chosen by AOE and Park. Look no further than the briefing in this case to buttress that proposition. AOE and Park refused to consent to the filing of an amicus brief by U.S. English -- AOE's own sister organization -- because of an apparently serious difference of opinion about how to defend and enforce the law.

Applying the Petitioners' vigorously urged analogy between the body of initiative voters and a true legislature, the true parallel to an assembly speaker or senate president -- like Karcher and Orechio in the *Karcher* case -- is the governor of the state, not an initiative sponsor. Thus, neither AOE nor Park is analogous to the whole state legislature or its "authorized representative"; the reasoning of the *Karcher* decision does not, by analogy or otherwise, confer standing on these lobbyists to defend Article XXVIII.

### C. Even if Petitioner Park Is Viewed As An Individual "Legislator," Petitioners Lack Standing

At best, under the strained comparison between the body of all voters in the initiative context and a true legislature, only Petitioner Park can even claim to be an individual lobbyist-legislator. As an organization, AOE is not itself a voter; therefore, under the analogy, it is not even a "legislator." Its only status is that of a lobbying organization. Thus, only Park can claim to be even potentially analogous to an individual "legislator" in the initiative context, but this status does not grant Park Article III standing.

Despite Justice White's statement in Karcher that the issue of individual legislator standing remains open, the issue as presented here has been resolved -- against such standing. If Park is the equivalent of an individual legislator, then this Court's decision in *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986), controls this case.



In *Bender*, the full nine-member school board defended a federal court challenge to its decision not to permit a proposed prayer club to meet on school premises. When the plaintiff student club members prevailed at the District Court, the board voted to forego its right to appeal and to accept the court's decision; only board member John C. Youngman, Jr. dissented. *Id.* at 544. Youngman, named as a defendant in the case in his status as a board member, filed a notice of appeal and prevailed at the Court of Appeals. *Id.* at 539-540. On certiorari, this Court raised, of its own accord, the issue of Youngman's standing to appeal.

The Court held that Youngman had "no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal." *Id.* at 543-44. The Court went on to state that "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." *Id.* at 544.

Under Park's own argued analogy -- that in the context of initiatives, voters are the "legislature" -- he is in the exact same position as board member Youngman in *Bender*. Here, the leader of the "legislature," Governor Mofford -- herself a voter-legislator and the chief of the body of Arizona voter-legislators -- determined to accept the District Court's decision and not to appeal. Park, a single member of the "legislative body," disagreed with the decision of the body, as made through its leader, and chose to file his own appeal. Under *Bender*, he lacks the necessary personal stake to pursue such an appeal. Thus, even if individual legislator standing is an open issue in certain contexts, *Bender* forecloses such standing where the legislative body defended a law at the trial court, but then chose to abandon its right to appeal.[13]

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[13] This distinction between *Bender* and *Karcher* may help

(continued...)

Even if *Bender* does not directly control the question of individual "legislator" standing in this context, any open questions about individual legislator standing should be resolved against such standing in the initiative context. The distinctions between actual legislators and voter-legislators are significant, and demonstrate that the analogy urged by AOE and Park cannot support the conferral of standing on individual voters like Park.

Unlike an actual legislator, Park is a "member" of a "legislative" body that never meets to deliberate on proposals, does not have a set membership size, does not hold public sessions, does not have members who are accountable to others for their actions, and does not record the votes of each member. These distinctions suggest why, even if individual legislator standing might be appropriate for actual legislators, its application to voter "legislators" in the initiative context raises more serious difficulties.

For example, because of the use of the secret ballot, every individual's vote on an initiative is secret. Thus, whether any particular "voter-legislator" voted in favor or against a particular proposal is inherently unverifiable. In the often bitterly disputed arena of initiatives, there can be no doubt that some voter-legislators might mischaracterize their actual views and votes in order to seize the right to direct the legal defense of a voter-enacted provision. How, then, could a federal court ensure that the first individual "voter-legislator" who seeks to intervene to defend an

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[13](...continued)
to explain Justice White's statement in his *Karcher* concurrence. In *Karcher*, the two legislative leaders "carried the entire burden of defending the statute" at issue from the first day of litigation. 484 U.S. at 75. Thus, unlike the school board in *Bender*, there was no considered, litigation-based decision to abandon a defense that had been attempted, unsuccessfully, at the trial court level. This case is more like *Bender* than it is like *Karcher*.



initiative is a qualified and appropriate defender? Contests between competing would-be-intervenors about how each actually voted would be inevitable if individual "legislator" standing were permitted in the initiative context. Of course, no similar issue arises as to true legislators, whose votes on legislation are ordinarily a matter of public record.

Second, voter-legislators are accountable to no one. Neither the direction nor intensity of their views are known, and even the amount of knowledge that they have of a particular issue is secret. Real legislators, in contrast, conduct public debate, make public statements, and conduct public hearings and inquiries; in short, their performance as legislators is on display well prior to any actual recorded vote. More important, real legislators are held accountable for that performance. They are subject to election at regular intervals, and they may even be recalled or removed from office prior to a regular election if their inadequate or inappropriate performance warrants it.

Voter-legislators, on the other hand, cannot lose their status except in the most extreme of circumstances. *See, e.g.*, Ariz. Rev. Stat. § 13-904 (conviction for felony suspends right to vote). Even if all of his neighbors, co-workers, and friends conclude that a particular voter-legislator is an extremist crackpot, they cannot expel him from the voter "legislature." This is, of course, one of the great strengths of our democracy: the protection of minority views. However, it also makes individual "legislator" standing to defend laws inadvisable, and likely unworkable, in the context of voter initiatives.

In effect, individual "legislator" standing in the initiative context would open the federal courts to every citizen for the entire length of his or her life. Moreover, there is no meaningful way to distinguish among all of these many "legislators" in according standing. Thus, the extremist crackpot is as much a "legislator" and therefore would enjoy

as much right to intervene and to direct his intervenor litigation as any civic leader. Disputes to determine who should be the lead or sole intervenor would bog down the federal courts for months or years in virtually every case of individual voter-legislator intervention. With real legislators, there are at least a finite number of potential individual intervenor legislators and at least some selection control through voter elections. No such safeguards exist in the initiative context.

The Court's decision in *Bender* forecloses individual "legislator" standing to intervene in cases like this one where the legislative body has elected, through its duly-chosen leadership, to abandon its defense of a law or policy. Moreover, even if individual legislator standing might be appropriate or workable in the context of a real "legislature," it is unworkable in the context of voter initiatives.

### D. Article XXVIII's Authorization of a Private Right of Action in State Court -- Essentially Allowing Taxpayer or Citizen Lawsuits -- Does Not Confer Standing Under Article III

AOE and Park assert that section 4 of Article XXVIII -- which recognizes a private right of enforcement of the law in Arizona state courts -- also confers standing under Article III for them to defend the law's constitutionality here. The lobbyists further contend that the private right of enforcement places AOE and Park -- as it would, under this theory, any other "person who resides in or does business in" Arizona -- within the "zone of interests" protected by the initiative constitutional amendment.

Section 4, it is true, reflects the state of Arizona's decision to confer standing on the basis of an abstract value interest in seeing Article XXVIII obeyed; however, that state decision simply cannot confer federal court standing under the Constitution. Were it otherwise, any concerned



bystander could pull himself into federal court by the bootstrap of state-recognized value-interest standing, successfully avoiding the longstanding disfavor of mere value interests.

Article XXVIII is hardly unique in creating a right to pursue abstract value interests in state courts. In fact, even without section 4, it is possible that any state taxpayer could nonetheless have enforced the initiative under Arizona's taxpayer-standing law. *See* Ariz. Rev. Stat. § 35-213 (state taxpayer may take action to enjoin or recover illegal payment of public monies if attorney general fails to take such action). Similar "taxpayer" or "citizen" rights "to air . . . generalized grievances about the conduct of government" appear in the code books or case volumes of most other states. *See Flast v. Cohen*, 392 U.S. 83, 106 (1968) (describing character of most taxpayer actions). In 1968, Justice Douglas noted in *Flast* that all but two of the states allowed taxpayer suits, and that a few openly rested their allowance of such suits on a notion of the taxpayer as "private attorney general seeking to vindicate the public interest." *Id.* at 108 (Douglas, J., concurring).

Yet despite the states' tolerance of private attorney general suits, this Court has steadfastly rejected an abstract generalized "public interest" as conferring Article III standing. Thus, with the limited exception of certain Establishment Clause claims, the Court has held that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing" even if the party claiming standing is a taxpayer. *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 477 (1982); *see also United*

*States v. Richardson*, 418 U.S. 166 (1974), *Frothingham v. Mellon*, 262 U.S. 447 (1923).[14]

The Court has been equally unreceptive to "citizen standing" -- standing based upon harm to "the generalized interest of all citizens in constitutional governance." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974); *see also Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (Brandeis, J.) (rejecting suit where "[p]laintiff has only the right, possessed by every citizen, to require that the government be administered according to law, and that the public moneys be not wasted").

Citizen standing, much like taxpayer standing, fails to identify any injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian College*, 454 U.S. at 485. The Court, articulating "unambiguous limitations on taxpayer and citizen standing," has long concluded that abstract, generalized value injuries are insufficient to satisfy Article III. *See Id.* at 488; *see also Richardson*, 418 U.S. at 192 (Powell, J., concurring) ("It merits noting how often and how unequivocally the Court has expressed its antipathy to efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government.").

Nearly half a century ago, the Court ruled that it could not, and would not, relax these strict rules against citizen and taxpayer standing merely because a state chooses to recognize such standing in its own courts. In *Doremus v.*

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[14] Even the Establishment Clause exception has been greatly restricted. "Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge Christian College*, 454 U.S. at 487.



*Board of Educ. of Hawthorne*, 342 U.S. 429 (1952), the Court declined to exercise jurisdiction over an action appealed from the Supreme Court of New Jersey, where the appellants' standing in state court rested solely on their status as citizens and taxpayers.

The Court concluded that what is true of federal taxpayers -- that their interests are "too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the . . . powers of the Court" -- was equally true for the appellants, regardless of the jurisdiction exercised by the New Jersey courts. *Id.* at 433; *cf. Tileston v. Ullman*, 318 U.S. 44 (1943) (per curiam) (dismissing appeal by doctor raising interests of patients despite Connecticut courts' exercise of jurisdiction).[15]

The decision in *Doremus* establishes that a state's allowance of value-based standing for citizens and taxpayers does not render those value interests any more significant for purposes of Article III. Thus, Petitioners' reliance on a single oblique footnote in *Diamond* is misplaced. In light of *Doremus* and the myriad other cases rejecting federal-court standing of private attorneys general, the Court's reference in *Diamond* to state-created "new interests, the invasion of which may confer standing," *Diamond*, 476 U.S. at 65 n. 17, could hardly have referred to private enforcement

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[15] Even before *Doremus*, in *Coleman v. Miller*, 307 U.S. 433 (1939), Justice Frankfurter, writing for four justices, rejected the notion that a state court's recognition of "an undifferentiated, general interest" could confer jurisdiction on the federal court. *Id.* at 466 (Frankfurter, J., concurring). "To whom and for what causes the courts of Kansas are open are matters for Kansas to determine. But Kansas cannot define the contours of the authority of the federal courts, and more particularly of this Court." *Id.* at 462 (Frankfurter, J., concurring) (footnote omitted).

authorizations like section 4.[16] Private attorneys general are strangers to the federal courts, and state value-based standing laws can make them no more familiar.

If adopted, however, AOE's and Park's theory that section 4 confers Article III standing on any Arizona resident would reverse all of this well-established jurisprudence. The theory would also open the federal courts to a tidal wave of new litigation previously barred from our federal courts of limited jurisdiction. None of the many states with some form of private attorney general standing doctrine could ever expect to make a decision against appealing a court ruling without some "citizen," "taxpayer," or "resident" intervening to protect his or her "right" to enforce the state law at issue. Given the likely plethora of willing government second-guessers, appeals would become virtually automatic, and the burden on overloaded federal courts correspondingly incredible.[17]

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[16] The fact that the Court has also rejected a *federal* private enforcement statute as creating standing makes AOE's reading of footnote 17 in *Diamond* even more unlikely. In *Valley Forge Christian College*, the Court rejected an attempt to rest standing on 5 U.S.C. § 702: "[n]either the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III." 454 U.S. at 487 n. 24.

[17] Nor would the limiting principle adopted by the Ninth Circuit constitute much of a limit at all. That court required some indication, beyond mere speculation, that Park would use the private right of action in section 4 to enforce Article XXVIII. *JA.* at 169, 939 F.2d at 734. That is not a difficult burden; any citizen could easily raise such a credible threat by an appropriate affidavit. Indeed, here, the Ninth Circuit simply *assumed* such a threatened enforcement action, without any affidavit, on the basis of an expression of interest by Park in the litigation. *See id.* That threshold -- mere expression of interest in the pending litigation -- would present no barrier at all; presumably, an attempt at intervention by a "taxpayer," "citizen," or

(continued...)



Moreover, because section 4, and other private attorney general statutes like it, express no preference among "residents," "citizens," or "taxpayers," the quality and appropriateness of such intervenor-filed appeals would be erratic at best -- often determined by a race to the courthouse among would-be intervenors. *See Richardson*, 418 U.S. at 189-91 (Powell, J., concurring) (uneven nature of taxpayer suits).

The fifty states' many broad and divergent standing doctrines are not magical master keys to open long-locked doors to the Article III courts. Section 4 does not confer federal-court standing on AOE, Park, or any of the other Arizona residents covered by it.

## CONCLUSION

For these reasons, the Court should vacate certiorari as improvidently granted. Furthermore, for the reasons stated in the brief of Respondent Yniguez, vacatur of the lower court opinion is not appropriate.

July 26, 1996

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[17](...continued)
"resident" would itself satisfy the test.

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IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1995

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ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,
*Petitioners,*

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME P. GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,
*Respondents.*

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On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

# Brief Of Amici Curiae American Civil Liberties Union, American Civil Liberties Union Of Northern California, Arizona Civil Liberties Union, American Jewish Congress, Anti-Defamation League, National Education Association, And People For The American Way, In Support Of Respondents

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## INTEREST OF AMICI

The interests of Amici are set forth in the Appendix accompanying this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

## STATEMENT OF THE CASE

In 1988, by the slimmest of margins (50.5% to 49.5%), Arizona voters added Article 28 to the Arizona Constitution declaring English the State's "official" language. Unlike "official English" legislation of any other state, Article 28 explicitly and broadly bans the government's use of non-English languages in communicating with limited- and non-English-speaking citizens and residents of Arizona. It requires every level and branch of government and all "government officials and employees during the performance of government business" to "act in English and no other language." §§1.2, 1.3. Article 28 also requires all levels of government "to preserve, protect and enhance the role of . . . English . . . as the official language," and prohibits all state and local entities from enacting or enforcing any "law, order, decree or policy which requires the use of a language other than English." §§1.3(b), 3.1(b).

Article 28 contains exemptions permitting the use of non-English languages only: to protect the rights of criminal defendants and victims, to protect the public health and safety, to teach a "foreign" language and to comply with federal laws. §3.2. These exemptions, which are both limited and vague,[1] leave unprotected a wide range of important and vital governmental functions and services, including consumer, social and voter education projects, vocational rehabilitation services, public education and all manner of civil and administrative proceedings, to identify but a few.

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[1] For instance, Article 28 gives no guidance as to where to draw the line between "public health" and non-"public health." Does it apply to routine vaccinations, individual drug or alcohol rehabilitation, psychological or trauma counselling, development of a toxic waste site? Similarly, is a parolee appearing before a parole board covered by the exception for "criminal defendants"?

This suit challenging Article 28 on First and Fourteenth Amendment grounds was brought by Maria-Kelley Yniguez, a state employee, and Jaime Gutierrez, a state legislator, each of whom routinely used Spanish in serving their public constituents and believed Article 28's ban on the use of non-English languages during the performance of their duties violated their rights and those of other public employees and the public. The District Court dismissed Gutierrez on procedural grounds but issued a declaratory judgment in Yniguez' favor, finding Article 28 overbroad under the First Amendment. 730 F.Supp. 309 (D. Ariz. 1995). The court later awarded Yniguez $1 in nominal damages.

Following the State's decision not to appeal, Petitioners Arizonans for Official English and Robert Park, sponsors of Proposition 106, were permitted to intervene in order to appeal the judgment. Respondent Arizonans Against Constitutional Tampering, the campaign organization that opposed Proposition 106, whose members include State legislators, was permitted to intervene on appeal as a plaintiff.

The Ninth Circuit affirmed, 69 F.3d 920 (9th Cir. 1995) (*en banc*), ruling that Article 28 violated the First Amendment rights of public employees and elected officials. It found that the government's communications in non-English languages were matters of public concern, particularly given the substantial impact of Article 28 on the public's right to receive government information, and that the interests in permitting such communication outweighed any asserted interest in prohibiting it.

## SUMMARY OF ARGUMENT

Article 28 of the Arizona Constitution is unlike any other law ever challenged on First Amendment grounds in this Court. It is a sweeping injunction against speech in any language other than English, harming vital First Amendment interests of the public without any record evidence of a compelling, substantial or even rational justification.

On its face, Article 28 explicitly suppresses a vast body of *pure speech*. Its sweep affects virtually *every* transaction



between non-English speakers and every branch of state and local government in Arizona. Its injunction against speech is indiscriminate and *ex ante*: it effectively precludes non-English speaking Arizonans, whatever their circumstances and needs, from communicating and interacting with their governments, including state and local legislators and their aides, even if the public employees and officials are willing and able to use non-English languages. It attempts to coerce compliance with a linguistic orthodoxy in a manner which actually undermines, rather than promotes, national unity. The extraordinary nature of this law -- whose proscriptions are so remarkably broad and sweeping as to defy the usual First Amendment categories of content and viewpoint neutrality -- warrants strict judicial scrutiny.

Petitioners contend that Article 28 should not be subject to any meaningful scrutiny, because it merely governs the State's speech in "internal operations" over which the government has virtually complete control. However, limiting this case to government control over *its* speech, internal or otherwise, ignores the most important participants in this First Amendment equation: the non-English speaking members of the public, *joint stakeholders* in the communications banned by Article 28, who will no longer be able to *communicate and interact with* the government on an almost limitless range of subjects.[2] Article 28, therefore, strikes at the core of participatory democracy and undermines a fundamental value of the First

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[2] For example, under Article 28, non-English speakers will no longer be able to participate in discussions with their elected representatives or those representatives' aides, who may be ready and able to communicate in their constituents' language. A non-English speaking citizen will be prevented from exchanging information with a government investigator about a fair housing, employment discrimination, environmental or wage violation claim. A non-English speaking parent will no longer be able to converse with a teacher about her child's progress in school or special needs. An unemployment or disability insurance claimant will not be able to converse with a claims representative about the fairness of a decision to terminate benefits.

Amendment -- the facilitation of self-governance essential to a democratically organized society.

These burdens, moreover, are selectively and discriminatorily imposed, purposefully falling on a discrete and historically disadvantaged segment of the public -- comprised almost exclusively of ethnic minorities and immigrants -- who are thereby excluded from virtually *all* communications with government *regardless* of their importance to the individual.

This case, therefore, is not controlled by the Court's public employee or government speech cases. *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny have all concerned the protection afforded to speech initiated by a particular employee (such as a presentation to the board of education, a complaint to co-workers about working conditions, or writings or speeches to the public). In contrast, Article 28's ban interferes with *interactive communications* between citizens and their government, and thus directly infringes the First Amendment rights of the public as well as those of public employees or officials. Moreover, unlike *Pickering*, the State does not assert any employment-related justification for Article 28.

Nor does Article 28 embody the government's interest in communicating a particularized message or viewpoint such as the advisability of abortion (*Rust v. Sullivan*, 500 U.S. 173 (1991)) or the political nature of particular films (*Meese v. Keene*, 481 U.S. 465 (1987)). Rather, it bars an entire medium of speech *irrespective* of its substantive content or message.

Furthermore, even assuming the government may under certain circumstances restrict public employees from using non-English languages in the course of their duties, Article 28's indiscriminate reach is fatally overbroad. It bars non-English communications not only by Maria-Kelley Yniguez, but also by elected officials communicating with their constituencies, by judges performing marriage ceremonies, and by public teachers, academics, and librarians in and out of the classroom.

Accordingly, the Court's consideration of the constitu-



tionality of Article 28 cannot be constrained by the mechanical application of public employee speech cases nor by the general proposition that the government has significant control over the content of its own speech. Rather, Article 28 must be examined in light of, and subject to searching scrutiny consistent with, the multiple First Amendment interests directly and substantially affected by its sweeping ban. Under this standard -- indeed, even under a less rigorous standard of review -- the asserted justifications for Article 28 are unpersuasive.

Although Petitioners assert that Article 28 will make the government more efficient, the State of Arizona has stipulated that its administrative efficiency and operational effectiveness is *enhanced*, not impeded, by its employees' ability to use non-English languages in the course of their duties. Indeed, independent of the State's stipulation, Article 28 *undermines* the asserted governmental interest in ensuring that its communications are "neither garbled nor distorted," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. ___, 115 S.Ct. 2510, 2518 (1995), precisely by requiring the State to communicate in a language incomprehensible to non-English speakers.

The general social goals Petitioners advance also fail to withstand scrutiny. Article 28 is not needed to protect English as the State's primary language: English is already spoken by 96% of Arizonans, and English acquisition remains a high priority among immigrants. Nor is Article 28 narrowly, or even reasonably, tailored to enhance English proficiency: it indiscriminately penalizes all non-English speakers by preventing them from interacting and communicating with government *regardless* of their circumstances or needs. Most importantly, Article 28 does not foster by "persuasion and example" the goal of national unity. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 640-42 (1943). Rather, Article 28 is an unconstitutionally coercive measure which categorically disenfranchises a discrete, disadvantaged and vulnerable segment of the population. Ultimately, its imposition of a rigid linguistic orthodoxy not only suppresses constitutionally protected communication in non-"official" languages, but it is divisive and

counterproductive to social cohesion as well.

## ARGUMENT

### I. ARTICLE 28'S SWEEPING, INDISCRIMINATE BAR EXPLICITLY AND PURPOSEFULLY SUPPRESSES PURE SPEECH.

Article 28 prohibits all public officials and employees in Arizona from acting (except for limited and ill-defined circumstances exempted in §3.2) in a language other than English while carrying out governmental functions and policies. In purpose and effect, it prevents all officials and employees from communicating with thousands of limited-proficient and non-English-speaking Arizonans even when they have the means, ability and desire to communicate in a language their public understands. Meaningful communication is barred regardless of need or public value. As the Court of Appeals noted, Article 28 "could hardly be more inclusive"; it "prohibit[s] the use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English." *Yniguez*, 69 F.3d at 933.

Article 28 thus contravenes core principles and values undergirding the First Amendment. First, it *directly bans pure speech on its face*. It thus poses a more immediate threat to First Amendment values than legislation which regulates conduct and only incidentally impinges upon speech. *Cf. United States v. O'Brien*, 391 U.S. 367, 375, 382 (1968); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Laws "directed at speech" and communication are subject to "exacting scrutiny" and must be "justified by the substantial showing of need that the First Amendment requires." *Texas v. Johnson*, 491 U.S. 397, 406 (1989); *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978) ("*Bellotti*"); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976).

Second, by requiring the government to use a language that is incomprehensible to the non-English speaking members of its public, Article 28 effectively bars communications *in toto*. The purpose of speech is to make oneself understood; imparting



a comprehensible message is the essence of communication.[3] Article 28 does not merely regulate a mode of expression[4] but bans communication completely. Therefore, it cannot be characterized as a mere time, place or manner restriction. Indeed, as this Court has only this Term observed:

> [C]omplete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression, are particularly dangerous because they all but foreclose alternative means of disseminating certain information.

*44 Liquormart, Inc. v. Rhode Island*, ___ U.S. ___, 116 S.Ct. 1495, 1507 (1996) (internal citation omitted); *see also City of Ladue v. Gilleo*, ___ U.S. ___, 114 S.Ct. 2038, 2045 (1994) ("Our prior decisions have voiced particular concern with laws

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[3] *See Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers") (Brennan, J., concurring).

[4] For example, if the State banned foreign language newspapers from printing in any language other than English, or conversely required that only one language (*e.g.*, Russian) be used, it could hardly maintain that it was merely regulating a "mode" of expression. *Cf. Meyer v. Nebraska*, 262 U.S. 390 (1923) (law restricting teaching of German in public and private schools unconstitutional); *Asian American Business Group v. Pomona*, 716 F. Supp. 1328 (C.D. Cal. 1989) (limiting use of non-English languages on private business signs violates First Amendment). The same would be true if the State required all public doctors to communicate with their patients solely in Latin, or required all government communications to be written, not oral, thereby excluding illiterate citizens from government services and functions. The point here is not to suggest that the government cannot impose any restrictions on its employees' speech, but simply that a law banning non-English languages has a profound impact on communication.

that foreclose an entire medium of expression").[5]

Third, Article 28 is so sweeping that it defies traditional First Amendment distinctions concerning content and viewpoint neutrality. However it may be characterized, Article 28's ban on speech affects virtually every communicative contact between thousands of limited- and non-English-speaking residents and every governmental entity in Arizona. Even a content and viewpoint neutral ban violates the First Amendment if it broadly impinges upon protected speech. *See United States v. National Treasury Employees Union*, ___ U.S. ___, 115 S.Ct. 1003, 1015 (1995) ("*NTEU*") (striking down content-neutral provisions of Ethics Reform Act because of significant burdens on public employee speech and on "the public's right to read and hear what Government employees would otherwise have written and said"); *City of Ladue*, 114 S.Ct. at 2045 (even content and viewpoint neutral laws "can suppress too much speech"); *Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (viewpoint neutral regulation unconstitutional because it

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[5] By definition, time, place, and manner restrictions presuppose the availability of alternative means of communication, such as the distribution rather than posting of leaflets on public property, *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), or the performance of a concert at a lower than desired volume, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). If the speaker is barred from using the only language comprehensible to the listener, no such alternatives exist. Here, the fact that the speaker is a government official or employee only underscores the absence of meaningful alternatives: not only is government often the sole *source* of information, but it often is the sole intended *object* of the communication.

To require non-English speakers to enlist the aid of private translators is not a meaningful "alternative." Translators may not be available to all members of the public (indeed, might be least available to those people who would need them most), and at best provide an inefficient and expensive means of communication. Such an alternative is not "ample." *Cf. City of Ladue*, 114 S.Ct. at 1025 (alternative not as cheap and convenient and may not be a "practical substitute"); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977) (alternatives "involve more cost and less autonomy").



"prohibited *all* protected expression") (emphasis in original). *See* Stone, "Content-Neutral Restrictions," 54 U. Chi. L.Rev. 46, 53-54 (1987) (content-neutral laws may nonetheless be subject to heightened scrutiny).[6]

Finally, like the law struck down in *NTEU*, Article 28's ban on speech is *ex ante*. Rather than providing the basis for a *post hoc* punishment of a public employee's speech, it is a "wholesale deterrent to a broad category of expression by a massive number of potential speakers" and thus "chills potential speech before it happens." *NTEU*, 115 S.Ct. at 1013-1014.[7]

## II. ARTICLE 28 INFRINGES UPON THE FIRST AMENDMENT RIGHTS OF LIMITED AND NON-ENGLISH-SPEAKING ARIZONANS TO PETITION FOR REDRESS OF GRIEVANCES AND TO COMMUNICATE WITH AND RECEIVE INFORMATION FROM THEIR GOVERNMENT.

"The Constitution often protects interests broader than those of the party seeking their vindication. The First Amend-

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[6] A strong case can be made, moreover, that Article 28's ban on speech is not content neutral in fact because its application turns literally upon the content of speech -- the words used. The government's regulation of the speaker's chosen words, even to convey a message that could be similarly expressed in other words, cannot be characterized as content neutral. *Cohen v. California*, 403 U.S. 15, 24 (1971) (generally "governmental bodies may not prescribe the form or content of . . . individual expression"); *Spence v. Washington*, 418 U.S. 405, 411 n. 4 (1974) (statute limiting expression violates First Amendment even if views could have been expressed in other ways). If proscribing particular words is content regulation, so perforce is a ban on entire vocabularies.

[7] The chilling effect of Article 28's broad, *ex ante* prohibitions is reinforced by the vagueness of its exceptions. Not only do these exceptions fail to give public employees guidance as to their application, *see* n. 1, *supra*, but Article 28 impels public employees to apply them narrowly since they may be disciplined or even sued, *see* §4, for violating its prohibitions. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

ment, in particular, serves significant societal interests." *Bellotti*, 435 U.S. at 776. Restrictions placed upon expression by the speaker may implicate distinct and different rights of the listener. *NTEU*, 115 S.Ct. at 1015 ("large-scale disincentive to government employees' expression also imposes a significant burden on the public's right to read and hear"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976).

While Article 28 is ostensibly directed at the speech of public employees and officials, it necessarily and substantially impairs the First Amendment rights of limited- and non-English-speaking residents of Arizona.[8] Article 28 extends well beyond so-called official "government speech" to affect virtually every interaction between government and the language-minority public, depriving thousands of non-English proficient citizens and residents of the opportunity not only to receive information from, but to communicate with (i.e., to be heard and responded to by) their government, and thus of their right to petition the government for redress of grievances. In this way, Article 28 not only offends fundamental First Amendment values essential to the functioning of our democratic republic, *see, e.g.*, *Bellotti*, 435 U.S. at 776-777; *Thomas v. Collins*, 323 U.S. 516, 529-32 (1945), but it also discriminatorily allocates its burdens by impairing the ability of discretely identifiable and historically disadvantaged groups to participate in their government.[9]

The right to petition for redress of grievances is a fundamental First Amendment right lying at the core of our democra-

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[8] According to the 1990 Census, 122,423 (4%) Arizonans over the age of 5 do not speak English well, while 275,907 (8%) do not speak English "very well." Bureau of the Census, *1990 Census of Population, Social and Economic Characteristics, Arizona*, 48 (1990). Included among limited and non-English speakers are elderly citizens and Native Americans. *See* 8 U.S.C. §1423(b)(2) (elderly long-time residents may be excused from English language requirement for naturalization).

[9] These claims are properly presented by the record in this case. *See* n. 21, *infra*.



cy. *McDonald v. Smith*, 472 U.S. 479, 482-83, 485 (1985); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217, 222 (1967) (right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights"); *U.S. v. Cruikshank*, 92 U.S. (2 Otto) 542, 552 (1876) (The right of the people to assemble and to petition their government for a redress of grievances is inherent in the concept of a republican form of government).[10] The right broadly protects "[g]reat secular causes[] with small ones" -- causes that are "not confined to any field of human interest," *Thomas v. Collins*, 323 U.S. at 531 -- and bars State interference with access to the legislature, the executive branch and its various agencies, and the judicial branch.[11]

Under Article 28, executive and administrative officials and employees, as well as legislative representatives and their staffs, are all barred from communicating with their constituents in Spanish or any language other than English. Because of its unprecedented scope, Article 28 interferes with everyday activities and communications most citizens take for granted, burdening the non-English speaking resident who seeks to take issue with his utility charges, to address his city council or school board, or to contest an eviction from public housing. By erecting a permanent linguistic barrier between non-English speakers and every branch and agency of their government on an almost limitless variety of subjects, Article 28 thus unques-

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[10] *See also Eastern R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) ("the whole concept of representation depends on the ability of the people to make their wishes known to their representatives"); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980) (First Amendment freedoms, including the right to petition for redress of grievances "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government").

[11] *See Noerr*, 365 U.S. at 137-38 (legislature); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (executive); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (administrative agencies); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. at 221 (courts).

tionably infringes the non-English speaking public's right to petition.

Furthermore, by categorically prohibiting public employees and officials from communicating in a non-English language (or even using non-English words), Article 28 effectively bars language minorities from receiving important, often vital, governmental information. Under Article 28, government employees are no longer able to convey in Spanish, Navajo, or Vietnamese information about a proposed redevelopment project, a water conservation program, consumer fraud, job training opportunities, wage and hour laws, changes in hunting and fishing regulations, the contemplated closure of a local school, or countless other subjects. Article 28 thus impairs the public's right "to receive information and ideas." *Virginia State Board of Pharmacy*, 425 U.S. at 757, quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

Access to government information is particularly important for the proper functioning of a democracy. "Governments have an almost unique capacity to acquire and disseminate information in the modern state." Yudof, *When Government Speaks*, 9-10 (1983); *see also* Meiklejohn, *Free Speech and its Relation to Self-Government* 65-66 (1948) (First Amendment protects right of people to intelligently discuss issues of public concern for purpose of self-government). Accordingly, the principle that "the right to receive ideas is a necessary predicate to the recipients' meaningful exercise of his own rights of speech, press, and political freedom," *Board of Ed. v. Pico*, 457 U.S. 853, 867 (1982), applies with particular force to government information. Certainly, the First Amendment interest in obtaining government information essential to the functioning of a democratic republic is at least as great as that in obtaining commercial information from private advertisers. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64-65 (1983) (commercial speech enjoys less protection than core First Amendment speech); *see also 44 Liquormart*, 116 S.Ct. at 1507-1508.

Finally, by barring public officials and employees from



communicating with members of the public in any non-"official" language, Article 28 effectively prevents *interactive* communications between the government and the non-English speaking public. Public employees can neither initiate communication with nor even receive or reply to inquiries in the languages understood by non-English-speakers. Article 28 bans everything from a town hall discussion with elected officials to a private dialogue between a parent and teacher. Without the possibility of conversation or dialogue, the essential nature of *communication* is thwarted.

Of course, *amici* do not claim that every denial of access to government or governmental information violates the Constitution. This case, however, does not challenge a failure to provide a particular service or notice in a non-English language. Rather, Article 28 was intended to *eliminate* multilingual governmental functions and services -- even those that promote government efficiency and equity and that government officials would otherwise voluntarily provide. Petitioners' reliance on cases rejecting constitutional claims that the government has a duty to provide a non-English language notice, examination, or service is therefore misplaced.[12] None of them involved an explicit and purposeful *suppression* of speech as sweeping as that presented here; indeed, none involved a First Amendment challenge at all. Although the plaintiffs in those cases asserted an affirmative right to bilingual services, this case involves a negative liberty -- the right not to have the government bar communications between willing speakers and listeners. *Cf. Maher v. Roe*, 432 U.S. 464, 475-77 (1977); *DeShaney v. Winnebago Dept. of Soc. Services*, 489 U.S. 189, 195 (1989). Nor did these cases involve the deliberate imposi-

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[12] *See Soberal-Perez v. Heckler*, 717 F.2d 36 (2nd Cir. 1983), *cert. den.*, 466 U.S. 929 (1984) (provision of governmental notices in English); *Toure v. U.S.*, 24 F.3d 444 (2nd Cir. 1994) (per curiam) (no governmental notices in French); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973) (provision of forms and services in English only); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (civil service exam provided only in English).

tion of burdens on language minorities; rather, the omissions or failures to provide bilingual services were the incidental result of neutral policies and practices, such as the reasonable allocation of limited resources. Article 28, in contrast, was enacted "'*because of*,' and not 'in spite of'," the burden it imposed on language minorities.[13] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977). Finally, Article 28's blanket ban on the use of all non-English languages in all levels and branches of government -- coupled with its deliberate withdrawal of bilingual services -- is a sweeping and pervasive infringement of constitutional guarantees that far exceeds the particularized failure of a single governmental agency to provide bilingual services or notices. *Cf. Pico*, 457 U.S. at 879 n.1 ("removal, more than failure to acquire, is likely to suggest an impermissible political motivation may be present") (Blackmun, J., concurring) (citation omitted).

## III. ARTICLE 28 DISCRIMINATES IN THE ALLOCATION OF FIRST AMENDMENT RIGHTS.

Article 28's unconstitutional ban on pure speech also offends core First Amendment precepts by imposing unequal barriers to communication with the government and by selectively disenfranchising language minority groups. Embedded within the First Amendment is "the principle of equal liberty of expression." Karst, "Equality as a Central Principle in the First Amendment," 43 U. Chi. L. Rev. 20, 23 (1975); *see, e.g., Carey v. Brown*, 447 U.S. 455 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("we have frequently condemned such discrimination among different users of the

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[13] Article 28's rationale, according to its proponents, was to withdraw available services and thereby make life difficult for non-English speakers so as to "encourage the learning of English." Pet. Br. at 17. *See* Arizona Publicity Pamphlet at 27 (argument submitted by Petitioner Robert D. Park (also chair of Petitioner Arizonans for Official English) ("passage of Proposition 106 would *encourage* non-English speakers to familiarize themselves with the language") J.A. 29 (emphasis added).



same medium for expression"). *See also Grosjean v. American Press Co.*, 297 U.S. 233 (1936), *Minneapolis Star & Tribune v. Minnesota Comm. of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987) (selective taxation targeting small, discrete segments of the press violative of First Amendment). *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973) (upholding a law restricting the political activities of state employees, finding it "is not a censorial statute, directed at *particular groups* or viewpoints") (emphasis added).[14]

Here, Article 28 egregiously violates the First Amendment equality principle by discriminatorily barring a small (relative to the general population), discrete, and already vulnerable group from the important arena of governmental communications. Article 28 is plainly "directed at particular groups," *Broadrick*, 413 U.S. at 616 -- groups that are at least as vulnerable and disfavored as the newspapers and magazines selectively taxed in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project*.[15] *Cf. Buckley*, 424 U.S. at 48-49 (govern-

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[14] *See also Rosenberger*, 132 L.Ed.2d at 714-15 ("In the realm of private speech or expression, government regulation may not favor one speaker over another"); *Bellotti*, 435 U.S. at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue"); *Buckley*, 424 U.S. at 18 (campaign expenditure restrictions that "discriminate among speakers" unconstitutional).

[15] At various times in American history, language minorities have been victimized by language barriers purposefully erected against them. *See* Leibowicz, "The Proposed English Language Amendment: Shield or Sword?" 3 Yale Law & Policy Rev. 519, 533-39 (1985) (English literacy requirements were erected as conditions for public employment, naturalization, immigration, and suffrage in order to exclude "new" immigrants from Italy, Russia, Hungary and other southern and eastern European countries); *id.* at 536 (New York Constitution was amended to disenfranchise over one million Yiddish-speaking citizens); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (schools prohibited from teaching German); *Castro v.*

(continued...)

ment may not "restrict the speech of some elements of our society in order to enhance the relative voice of others"; First Amendment "designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources"'").

To be sure, the differential treatment condemned in prior cases, which involved only indirect and incidental burdens on speech,[16] was animated primarily by concern over viewpoint suppression by the State. However, this Court has never before countenanced the direct and purposefully discriminatory infringement upon the First Amendment rights of a discrete and disfavored group -- consisting almost exclusively of immigrants and ethnic minorities -- whose lack of English proficiency already disadvantages them in the arena of public discourse and governmental communication. Nor should it do so here. Official suppression of viewpoints is not the sole concern of the First Amendment. *See City of Ladue*, 114 S.Ct. at 2045; *Jews for Jesus*, 482 U.S. at 574-576; *Minneapolis Star*, 460 U.S. at

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[15] (...continued)
*California*, 2 Cal.3d 223 (1970) (California Constitution amended to disenfranchise Chinese-speaking voters); Reyhner, "Policies Toward American Indian Languages: A Historical Sketch," *Language Loyalties*, 41-47 (1992) (J. Crawford, ed.) (Native American children separated from their families and forced to attend English language boarding schools where they were punished for speaking native language). Congress has recognized the continuing depth of discrimination against language minorities. *See* 42 U.S.C. §1973b(f)(1). *See also Hernandez v. New York*, 500 U.S. 352, 371 (1991) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis").

[16] *See Leathers v. Medlock*, 499 U.S. 439, 452-453 (1991) (extension of generally applicable sales tax to cable television services but not to print media); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (contributions to non-profit organizations engaged in lobbying not deductible except for veterans organizations); *Mabee v. White Plains Publ. Co.*, 327 U.S. 178 (1946) (exempting certain small newspapers from general application of Fair Labor Standards Act to newspapers and other businesses).



592. A statute challenged under the First Amendment "must be tested by its operation and effect." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931); *see also*, *NAACP v. Richmond*, 743 F.2d 1345, 1356 (9th Cir. 1984). The systematic deprivation of an identifiable group's right to communicate with government undermines one of the First Amendment's central values and functions: to "secur[e] and foster[]" the integrity of "our republican system of self-government." *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring).[17] It threatens to distort the marketplace of ideas. *See* Stone, 54 U. Chi. L.Rev. at 55.

In addition to suppressing the fundamental right of language minorities to communicate with their government, Article 28 also imposes a structural obstacle to their participation in the political process by flatly prohibiting any public entity, including state and local legislatures, from "mak[ing] or enforc[ing] a law, order, decree or policy which requires the use of a language other than English." Art. 28, §3.1. Like the initiative measure struck down in *Romer v. Evans*, ___ U.S. ___, 116 S.Ct. 1620 (1996), Article 28 precludes language minorities from seeking beneficial legislation (*e.g.*, establishing multilingual services) through the normal political process. Unlike any other group (such as women, the disabled, veterans, or the elderly), language minorities may obtain beneficial legislation "only by enlisting the citizenry of [Arizona] to amend the state constitution . . . . This is so no matter how local or discrete the harm, no matter how public and widespread the injury." 116 S.Ct. at 1627. As in *Romer*, Article 28 thus imposes "a broad and undifferentiated disability on a single named group" and "identifies persons by a single trait," *id.* at 1628, in denying them the right to equal participation in the process of government. *See also*, *Hunter v. Erickson*, 393 U.S.

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[17] The discriminatory imposition of burdens may violate the First Amendment even when the government has no improper censorial motive. *Minneapolis Star*, 460 U.S. at 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"). The *risk* of suppression, regardless of motive, is sufficient. *Leathers*, 499 U.S. at 453.

385, 391 (1969); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 483-84 (1982).

## IV. THIS CASE DOES NOT CONCERN THE STATE'S CONTROL OVER ITS "INTERNAL OPERATIONS-" AND GOVERNMENTAL SPEECH.

Despite Article 28's infringement upon core First Amendment interests, Petitioners claim that Article 28 should not be subject to any significant judicial scrutiny because the state has virtually complete power over its own speech. The argument is meritless, and neither *Rosenberger*, 115 S.Ct. 2510, nor *Rust*, 500 U.S. 173, upon which Petitioners rely, are apposite, let alone controlling.

The concept of "government speech," as explained in *Rust* and *Rosenberger*, basically encompasses the government's ability to promote and expound its views and policies -- usually through policy choices made by specific agencies, or by the legislature and implemented by the executive branch -- without being obliged to offer "equal time" to other views. *Rust* gives a paradigm example: "[w]hen Congress established a National Endowment for Democracy . . ., it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." 500 U.S. at 194; *see also Meese*, 481 U.S. 465 (government may express its views about whether certain films are "political propaganda").

Nonetheless, although the State as speaker "may make content-based choices" and "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted," *Rosenberger*, 115 S.Ct. at 2518, the State may not use its expression to threaten or coerce and thus interfere with the civil liberties of citizens, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *see also Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (Scalia, J.) ("The line of permissibility, we think falls . . . between the disparagement of ideas . . . and the suppression of ideas through the exercise or threat of state power").



Article 28 reflects no "government speech" interest: it neither embodies any government interest in conveying a substantive message or viewpoint nor ensures that any substantive government message is not garbled or distorted. In fact, as Arizona has acknowledged, Article 28 actually *undermines* its interest in ensuring its messages are clearly understood. As its proponents intended, its prohibitions ensure that thousands of limited and non-English-speaking Arizona residents will get either a garbled message or no message at all. *See Amicus* Brief of National Council of La Raza, *et al.* (describing impact of Article 28 on government communications with language minorities).

Article 28 also does not negate the State's ability to make a content-based choice to communicate a substantive message. With or without Article 28, the State can express or withhold its views on abortions, films, books, welfare, immigration policy or any other matter within its legitimate sphere. It can advise the public about the importance of a common language and the benefits to all its residents of learning English. Article 28's ban on the use of non-English languages, however, has nothing to do with such content-based choices on speech because its coercive prohibitions ban virtually all non-English communication *regardless* of its substantive content.[18]

Nor does Article 28 merely regulate the "internal operations" of government, as Petitioners contend. Rather, Article 28 extends well beyond the confines of official "government

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[18] To the extent Petitioners maintain that the State is delivering a symbolic message about national and social unity in banning all non-English languages from governmental discourse, Article 28 is not merely advisory. Rather, it *coerces* the public's expression of and participation in a particular substantive message at the expense of the public's own constitutionally protected speech rights. The coercion of such orthodoxy in a misguided attempt to foster national or social unity violates the same basic First Amendment rights vindicated in *Barnette*, 319 U.S. at 640-42 ("no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith" in a prescribed orthodoxy).

speech" to affect virtually every interaction between the government and a substantial segment of the public. It imposes a strict ban on the speech of multifarious state and local officers and employees, including judges and legislators, who have many different substantive messages to convey; and it also suppresses communication by, and receipt of information from, the non-English speaking public.

Moreover, the Court has never extended the "government speech" theory to a law affecting governmental communications as vast and various as those encompassed by Article 28. In contrast to the situation in which a particular executive agency seeks to convey its own particular message (*e.g.*, *Rust*), an assertion of a "government speech" interest in such a broad range of communications by every level and branch of the government as a whole is highly suspect because there is: (1) less likelihood of a coherent, particularized message;[19] (2) an increased risk of large-scale infringement upon the free speech rights of public employees, other agencies of government, and the public; and (3) a greater risk of a "pall of orthodoxy" than where a single agency is involved. *Cf. Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Thus, neither *Rust* nor *Rosenberger* controls this case.[20]

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[19] Government "speaks" with many voices: legislative and judicial branch employees, for example, may, and often do, vociferously disagree. Even within the executive branch different agencies may have different messages to convey (e.g., occupational safety vs. corporate promotion, or civil rights enforcement vs. defense of government officers who are sued for civil rights violations). Local and county offices often have different messages than statewide agencies.

[20] *Rust*, which upheld a prohibition on spending federal subsidies under Title X for abortion counseling, is inapposite for additional reasons. First, the challenged restrictions applied only to the grantee's project activities receiving Title X monies; the grantee was left "unfettered in its other activities." 500 U.S. at 196. Clinics could continue to provide, and patients could continue to receive, abortion counseling so long as Title X monies were segregated from that activity. In contrast, Article 28's bar (continued...)



The primary thrust of Article 28 is not to convey a substantive message but to suppress virtually all communications between non-English proficient Arizonans and their government, to deprive legislators and other government officials of their constitutional rights to communicate with the public, and to garble, rather than enhance, whatever messages the government may legitimately desire to express.

## V. ARTICLE 28 IS SUBSTANTIALLY OVERBROAD.

A law is unconstitutionally overbroad if it burdens a substantial amount of protected speech and thus presents "'a realistic danger'" that it will "'significantly compromise recognized First Amendment protections of parties not before the Court . . . .'" *Jews for Jesus*, 482 U.S. at 574, quoting *Taxpayers for Vincent*, 466 U.S. at 801. Facial challenges based on overbreadth are permitted because of the severe "chilling effect" overbroad laws have on protected speech. *Jews for Jesus*, 482 U.S. at 574-76. Thus, because it poses on its

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[20] (...continued)
is near absolute, and, as in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), distinguished in *Rust*, no alternative means exist by which non-English-speakers can communicate with the government to obtain information which, unlike abortion counseling, often is not available elsewhere.

Nor did *Rust* involve a "general law singling out a disfavored group on the basis of speech content." 500 U.S. at 194. As demonstrated above, Article 28 does single out an historically disfavored, vulnerable group and, with only limited and vague exceptions, effectively bars all their communication with government.

Finally, *Rust* is predicated on the recognized distinction between "state interference with protected activity" and "state encouragement of alternative activity." 500 U.S. at 193, quoting *Maher*, 432 U.S. at 475. Article 28 clearly crosses that line into illegitimate "interference" with basic First Amendment freedoms. The citizenry's right to communicate with and receive information from their government, and to petition for redress of grievances, is historically rooted in our constitutional democracy and long recognized as essential to the proper functioning of a republican form of government. *See* Section II, *supra*.

face too great a risk of censorship, a statute may be impermissibly overbroad even assuming it has some constitutional applications. *Vincent*, 466 U.S. at 798-800.[21]

Judged by these standards, Article 28 is plainly overbroad.[22] Even assuming the State may require its employees to use only English in certain contexts (such as in communicating with monolingual English speakers, in performing a joint task with other employees who speak only English, or in preparing documents which must be reviewed by English-speaking supervisors), Article 28, if upheld, would regularly and unavoidably suppress a wide range of core First Amendment speech.

First, as demonstrated above, Article 28 does not just burden, it outright *bans*, speech: it does so not just on a single subject but on a vast range of subjects on which the limited- and non-English-speaking public may need to communicate with government. It imposes a large-scale infringement upon the rights of the public to receive information, to communicate with the government, and to petition for redress of grievances.

Second, Article 28 censors a huge category of communi-

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[21] As in any overbreadth case, the plaintiff may properly assert the First Amendment interests of all those potentially affected by the challenged law: here, other public employees, elected officials, and members of the public whose rights to receive information, communicate with government, and participate in the political process are infringed. *See, e.g., Vincent*, 466 U.S. at 798; *Broadrick*, 413 U.S. at 612; *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940). In addition, Respondent Arizonans Against Constitutional Tampering (AACT) represents the interests of the public as well as legislators and executive branch employees. *See* AACT Brief in Opposition at 2; Arizona Publication Pamphlet at 32 (argument submitted by State Representative Armando Ruiz, chairman of AACT) J.A. 39-40.

[22] Although the "substantial" overbreadth requirement does not have a particular quantitative threshold, the requisite degree of "substantiality" diminishes where, as here, pure speech rather than expressive conduct is regulated. *Broadrick*, 413 U.S. at 612-13.



cations between and among elected officials in all branches and at all levels of government, their entire staffs, and their constituents. These communications, to which the concept of "government speech" simply does not apply, deserve the First Amendment's greatest protection. *Bond v. Floyd*, 385 U.S. 116, 135-37 (1966). In this respect alone, Article 28 is substantially overbroad because, in suppressing speech by elected officials and their staffs, it thereby thwarts vital communication throughout the government. *See Yniguez*, 69 F.3d at 950 (Brunetti, J., concurring). *See Amicus* Brief of the Congressional Asian Pacific American Caucus and the Congressional Hispanic Caucus (elaborating on this point).

Finally, however the individual plaintiffs' free speech rights may be categorized, Article 28's wholesale bar goes much farther to affect virtually every contact or conversation any public employee may have with non-English-speaking members of the public and to prevent speech between willing speakers and listeners in a nearly infinite variety of circumstances. As the Ninth Circuit's decision demonstrates, even viewed within *Pickering*'s less rigorous First Amendment framework, there are many instances where employee speech is a matter of public concern and the interest in permitting that speech outweighs the State's interest in prohibiting it. *Yniguez*, 69 F.3d at 938-42.[23]

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[23] Contrary to U.S. English's suggestion, Article 28 cannot be "narrowly construed" to eliminate its substantial overbreadth. No readily identifiable unconstitutional term can be excised. *See Brockett v. Spokane Arcades*, 472 U.S. 491 (1985). Nor do the exceptions in §3.2 significantly limit Article 28's sweep. Indeed, they are so vague that they offer no assurance of a sufficiently narrowing interpretation and, indeed, create additional constitutional problems by vesting unbridled discretion in those charged with their enforcement. *See, e.g., Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 133-36 (1992); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976). As this Court has made clear, federal courts cannot rewrite state laws; only when a provision is "'*readily susceptible*' to a narrowing construction" can a court interpret it to avoid constitutional invalidation. *Virginia v. American Booksellers Association*, 484 U.S. 383, 397 (1988) (emphasis added). Article 28

(continued...)

In an attempt to negate such overbreadth, Petitioners advocate for a categorical rule that public employees have virtually no First Amendment rights with respect to speech in the course of government business. Under that theory, a state employee's discussion of conditions at public hospitals, a whistleblower's report critical of high officials, an administrative judge's finding of government wrongdoing, a teacher's exercise of academic judgment in the classroom, or a public defender's representation of a client would have no meaningful First Amendment protection against the State's interference simply because the speech is performed in the course of governmental business.[24] Such a rule asks too much.

On its face, Article 28 prohibits even a single word or phrase in Spanish or any other foreign language by any public official or employee in a vast number of instances irrespective of the circumstances and regardless of the importance of the subject matter. Because its reach extends well beyond whatever core of communications between government and its citizens the State could legitimately require to be made solely in English, Article 28 is hopelessly overbroad.

## VI. PETITIONERS' JUSTIFICATIONS FOR ARTICLE 28 DO NOT WITHSTAND CLOSE SCRUTINY.

Article 28's extraordinary, wide-ranging and purposeful ban on pure speech substantially impairs core First Amendment interests of the public, and of public officials and employees, and selectively disenfranchises language minorities from the processes of government. Article 28, therefore, should be subject to strict judicial scrutiny. *See, e.g., NAACP v. Button*, 371 U.S. at 438-39; *Thomas v. Collins*, 323 U.S. at 529-30.

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[23] (...continued)
"simply leave[s] no room for a narrowing construction." *Jews for Jesus*, 482 U.S. at 575.

[24] It would also mean that the government could force all its employees to wear ideological lapel pins or deliver ideological messages irrespective of their normal duties. *Yniguez*, 69 F.3d at 940, n. 24.



Article 28 should not be subject only to rational basis review as "government speech" for the reasons set forth in Section IV, *supra*. Nor should it be analyzed under the less rigorous balancing test of *Pickering* and its progeny, since the State has negated any employment-related justification in stipulating that its employees' use of non-English languages enhances rather than diminishes its efficiency and effectiveness. J.A. 53-54. Moreover, *Pickering* and its progeny have all focused on protection afforded to speech initiated solely by government employees. Article 28, in contrast, directly infringes upon *interactive* communication between the government and its citizenry and thus directly implicates the constitutional rights of the public.[25]

Under any standard of review, Article 28 is unjustified and irrational. None of the four discernable justifications Petitioners have posited in support of Article 28 withstands constitutional scrutiny: none has been shown on this record to be compelling, substantial or even rational; nor has Article 28 been shown to be, nor is it, narrowly tailored to further any of the asserted interests.

### A. The State's Interest In Acting In English.

Petitioners contend that the State has an interest in choosing a single language in which to conduct its affairs. Pet. Br. at 27-29. Even assuming that the State has such an interest,

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[25] Thus, by Article 28, Arizona is not regulating its employees' speech in its capacity as employer; it is regulating their speech, as well as that of the public, in its capacity as sovereign. *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878, 1886 (1994). *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 n.4 (1990) (where restrictions on employee speech are not "employment-related," there is no reason to relax strict scrutiny ordinarily applicable); *44 Liquormart*, 116 S.Ct. at 1508 (where ban on advertising serves an end unrelated to consumer protection, it must be reviewed with "special care" exceeding traditional scope of review afforded to commercial speech). In any event, for the reasons stated by the Ninth Circuit, Article 28 fails even the *Pickering* test.

that interest does not justify a *prohibition* of governmental provision of *supplementary* communications in other languages where necessary and appropriate.

### B. The State's Interests in Efficiency and Effectiveness.

Petitioners claim that the use of a single language in the performance of all government functions will make government more efficient. As noted above, however, Arizona has stipulated that the State's operational efficiency is *enhanced*, not diminished, by permitting public employees to communicate effectively with non-English-proficient citizens. Nothing in the record demonstrates there has been any administrative problem resulting from the long-standing use of Spanish and other languages by state employees.[26]

Moreover, even if operational problems had been shown, Article 28 is overbroad. There is no showing that a more narrowly tailored measure, such as permitting individual supervisors or departments to impose particularized language restrictions appropriate to the specific circumstances, would be inadequate.

### C. The State's Interest In Encouraging Non-English Speakers To Learn English as Society's Common Language.

Assuming the State has a substantial interest in encouraging English proficiency among its residents, Article 28 is an ineffective and inappropriate means of accomplishing that end. First, it is unnecessary. English is already spoken "well" by 96% of the Arizonans over the age of 5. See n. 8, *supra*. Notwithstanding the alarms over "official multilingualism" sounded by Article 28's proponents, the rate of English acquisition among immigrants is as rapid today as ever.[27]

Nor do language minorities need an "incentive" to learn English. In fact, the problem is the lack of English language classes and other such resources available to these groups, not their lack of desire to learn English.[28] Article 28 does nothing constructive to increase the availability of such resources.

Nor is Article 28 tailored narrowly, if at all, to further this asserted interest. It effectively penalizes *all* Arizona residents not proficient in English -- barring them from access to government services, information, and communication -- regardless of their circumstances, abilities or needs. It indiscriminately sweeps within its reach elderly residents who no longer have the capacity to learn a new language, recent immigrants who have not had an opportunity to learn English, and migrant workers who because of limited time and resources cannot enroll in adult English classes. For these individuals and

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[26] Petitioners' assertion that Yniguez wrote releases only in Spanish which her supervisor could not understand misstates the record. *See* Brief in Opposition [to Petition for Certiorari], of Respondent Yniguez, Appendix at 3-5.

[27] Half of all recent Mexican immigrants in California speak English already. Among first-generation Mexican-Americans, 95% are proficient in English; the transformation is even more dramatic for second-generation Mexican-Americans, with at least 50% having lost proficiency in their native tongue. K. McCarthy and R. Valdez, *Current and Future Effects of Mexican Immigration in California* (The Rand Corp. 1985). Other studies show the rate of English acquisition by language minorities is just as rapid as it has been in previous generations. Veltman, *The Future of Spanish Language in the United States* (New York, Wash. D.C.: Hispanic Policy Dev. Project, 1988) at i-x; D. Myers, *The Changing Immigrants of Southern California*, Exh. 4.2, Lusk Center Research Institute, U.S.C. (1995).

[28] In the Miami area, 98% of Latino parents surveyed, as compared to 94% of Anglo parents, felt it was essential for their children to read and write English perfectly. *See The 1985 South Florida Latin Market* (Strategy Research Corp. 1985). Indeed, the demand for English as a Second Language training far outstrips supply nationwide, resulting in long lines and waiting lists for the few available classes. See W. Bliss, "Providing Adult Basic Education Services to Adults with Limited English Proficiency," *Report by Project on Adult Literacy of Southport Institute for Policy Analysis* (1988).

many others, "language might well be an immutable characteristic like skin color, sex or place of birth." *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. den.* 449 U.S. 1113 (1981). The burdens Article 28 imposes on these classes clearly do not further its ostensible goals. Indeed, because Article 28 restricts how educators may choose to implement English acquisition programs by prohibiting native language instruction even where proven to be effective (except where mandated by federal law), Article 28 actually *undermines* the asserted goal.

### D. The State's Interest In Protecting "National Unity."

Finally, Petitioners argue that the State "has substantial interests in protecting itself and society from the divisive effects of official multilingualism." Pet. Br. at 36. Fatal to Petitioners' position, however, is their failure to present any evidence to support their assertion either that the government's provision of multilingual services threatens societal unity, or that non-English speakers are seeking some form of political separation. When the State suppresses speech to prevent anticipated harms,

> ". . . it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."

*NTEU*, 115 S.Ct. at 1101.

In fact, there is no language war between English, Spanish and Native-American speakers in Arizona. Not only does our nation's rich history of multilingualism belie the presumption that linguistic diversity inherently threatens our social fabric,[29] but Congress has recently reaffirmed the

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[29] See *Amicus* Brief of the State of New Mexico (describing state's rich history of official bilingualism) and *Amicus* Brief of Congressional (continued...)



"crucial" contribution multilingualism makes to "our nation's economic competitiveness and national security," as well as to our "global perspective" and "understanding of diverse people and cultures." 20 U.S.C. §7512 (Foreign Language Assistance Act of 1994, Pub. L. 103-382 (1994)). This historical tradition, carried forward to the present, refutes Petitioners' alarmist contentions.

Even more fundamentally, for the reasons described in the *Amicus* Brief of the Linguistic Society of America ("LSA"), the suppression of non-"official" languages is actually counterproductive to national unity. Throughout the world, tensions between groups over language have generally been the manifestation, not the cause, of underlying social problems; attempts to suppress one language invariably exacerbate the problem.[30]

Given this tradition, the State's attempt to forge societal unity through coercion is irreconcilable with basic constitutional principles. As this Court observed over a half-century ago:

> National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement. [¶] . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to

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[29] (...continued)
Asian Pacific American Caucus, *et al.* (describing the long history of multilingual communication by government since our nation's inception).

[30] See Maldoff, "Comment: a Canadian Perspective," 60 Int'l J. of the Sociology of Language 105, 106 (1986) (conflict between French and English speakers in Canada is the "*result of the withdrawal of, or the failure to recognize, language rights* rather than the result of linguistic tolerance and generosity") (emphasis added); Beardmore and Willemyns, "Comment," 60 Int'l J. of the Sociology of Language 117, 120-121 (1986) (tensions in bilingual nations such as Belgium due not to bilingualism, but rather to historical factors and lack of equality afforded to subordinate language group).

> whose unity it shall be. . . . [¶] . . . [T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

*Barnette*, 319 U.S. at 640-41.

Thus, Article 28 has *no* legitimate justifications, and fails to pass muster under *any* standard of review. *See Yniguez*, 69 F.3d at 944-47. As in *Romer*, its "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects." 116 S.Ct. at 1627.

## CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit in this case should be affirmed.

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# APPENDIX

## APPENDIX

## INTEREST OF *AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members. The American Civil Liberties Union Foundation of Northern California and the Arizona Civil Liberties Union are regional affiliates of the ACLU. The ACLU was founded over seventy-five years ago to preserve and protect the fundamental principles of the Bill of Rights. Central to those principles is the First Amendment's guarantee of freedom of speech, including the right to receive information, to communicate with the government, and petition the government for redress of grievances. The ACLU has also been active in protecting the rights of language minorities from discrimination and infringement upon their speech rights.

The American Jewish Congress ("AJC") is an organization of American Jews founded in 1918 to promote the civil, political, economic and religious rights of American Jews. AJC opposes English-only policies of the sort adopted by Arizona. This position is fueled by history. The American Jewish Congress was founded by Jewish immigrants from Eastern Europe, few of whom arrived speaking any English. Although it is now forgotten, these immigrants were aided by the use of Yiddish by various branches of government to facilitate their contacts with government.

The Anti-Defamation League ("ADL") is one of the nation's oldest civil rights organizations. It was founded in 1913 to combat anti-Semitism and promote good will among all races, ethnic groups, and religions. As set out in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against any sect or body of citizens." ADL joins in this *amicus curiae* brief because Article 28 of the Arizona Constitution discriminates against non-English speaking minorities, and singles these groups out for disparate treatment in a variety of public contexts in violation of their constitutional rights. It is ADL's belief that when the rights of any group of citizens are jeopardized or impaired the fundamental rights of all citizens are at risk.

The National Education Association (NEA) is a nationwide employee organization with a current membership of 2.2 million members, the vast majority of whom are employed by public education institutions. NEA opposes legislation requiring public employees to speak English only while on the job because it disregards cultural pluralism and deprives those in need of education, social services, and employment.

People for the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs before this Court in litigation seeking to defend First Amendment rights. People For has joined in filing this brief to help vindicate the important First Amendment principles and values at stake in this case, particularly the right of the public to receive important information and to petition the government for redress of grievances, and the underlying, fundamental values of tolerance, pluralism, and participatory democracy.

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No. 95-974

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

*Petitioners,*

vs.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; LEGAL AID SOCIETY OF SAN FRANCISCO, EMPLOYMENT LAW CENTER; ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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**ADDITIONAL AMICI CURIAE**
**(continued from front cover)**

**ASIAN PACIFIC AMERICAN LABOR ALLIANCE, AFL-CIO; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; ASIAN LAW CAUCUS, INC.; ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA; COMMUNITY SERVICE SOCIETY OF NEW YORK; HISPANIC BAR ASSOCIATION; LANGUAGE RIGHTS COALITION; MASSACHUSETTS ASSOCIATION OF HISPANIC ATTORNEYS; MULTICULTURAL EDUCATION AND TRAINING ASSOCIATION, INC.; NATIONAL ASSOCIATION FOR BILINGUAL EDUCATION; NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION; NATIONAL ASSOCIATION OF KOREAN AMERICANS; NATIONAL KOREAN AMERICAN SERVICE AND EDUCATION CONSORTIUM, INC.; ORGANIZATION OF CHINESE AMERICANS, INC.**

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

Since its inception in 1972, the *Puerto Rican Legal Defense and Education Fund, Inc.*, (PRLDEF) has worked to protect the civil and political rights of the Puerto Rican and Latino communities. PRLDEF has represented Latinos in numerous cases throughout the country seeking to protect and further their rights in the areas of voting, education and language rights. *See, eg. Hernandez v. New York,* 500 U.S. 352 (1991). The issue presented in this case, whether English may be established as an official language, is of critical importance to the Latino community and this organization because such a policy would, if upheld, deny Latinos the ability to fully and equally participate in American society.

The *National Asian Pacific American Legal Consortium* is a not-for-profit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans through a national collaborative structure that pursues litigation, advocacy, public education and public policy development. The Consortium is interested in the present case because it believes that Article 28 places linguistic barriers on the full social and political participation of Asian Pacific Americans.

The *Legal Aid Society of San Francisco, Employment Law Center* (ELC), a project of the Legal Aid Society of San Francisco, is a private, non-profit, public interest law firm that has litigated issues relating to employment discrimination and other workplace rules for over twenty years. Through its work, ELC has challenged laws that impact upon communities of color and recent immigrants to the United States, including cases in which the rights of non-English speakers have come under challenge. *See, e.g., Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994). ELC has appeared as amicus in the parallel Arizona state court challenge to Article 28. *Ruiz v. Arizona*, (Arizona Court of Appeals No. 1 CA-CV 94-235).

The *Asian Pacific American Labor Alliance*, AFL-CIO (APALA), is a non-profit labor organization founded in 1992 to defend and advocate for the civil and human rights of the Asian Pacific American community and provide a vehicle within our society for the concerns of Asian Pacific American Workers. APALA's membership includes many immigrant workers for whom English is a second language. APALA is interested in the present case because Article 28 and laws like it infringe on the rights of its members.

The *Asian American Legal Defense and Education Fund* (AALDEF) is a civil rights organization that addresses critical issues facing Asian Pacific Americans through community education, advocacy and litigation. Program priorities include the elimination of anti-Asian violence, advancement of immigrant rights, employment and labor rights, and redress for Japanese American World War II internees. AALDEF has an interest in opposing Article 28 because we believe that it violates the civil and political rights of Asian Pacific Americans in contravention of the work of this organization.

The *Asian Law Caucus, Inc,*. (ALC) is a not-for-profit, public interest legal organization whose mission is to promote, advance and represent the civil rights of Asian and Pacific Islander (API) communities. Since the majority of APIs are foreign-born, ALC's first priority is working to overcome language barriers to facilitate the full political participation of all members of society. ALC believes that Article 28 punitively singles out limited English proficient Arizonans by denying them access to basic services and the opportunity to fully participate in society.

Founded in 1983, the *Asian Pacific American Legal Center of Southern California* (APALC) is a not-for-profit legal organization dedicated to serving the Asian and Pacific Islander communities through direct services, community education, leadership development, advocacy and litigation. Programs focus on immigration, language rights and civil rights amongst other issues. APALC opposes Article 28 because it unduly burdens the rights of Asians and Pacific Islanders.



The *Community Service Society of New York* (CSS) can trace its history of serving the poor back 150 years. Throughout this time CSS has provided direct services to the poor and immigrant communities of New York and has been a voice in promoting policies that enable these communities to escape poverty. CSS promotes the respect and development of various languages and the simple notion that the government must be able to respond to the needs of its constituents in languages they can understand. To that end CSS has testified before legislative bodies on language policy issues and therefore, has an interest in the proceedings herein.

Founded in 1973, the *Hispanic National Bar Association* is the incorporated, non-profit, national association of Hispanic (HNBA) attorneys, judges, law professors and law students committed to promoting, the goals and objectives of the Association. The HNBA has been the principal force behind the increased representation of Hispanics in all sectors of the legal profession and has served as a legal voice for Hispanics for over twenty years. The HNBA is dedicated to serving as the national voice for the concerns and opinions of Hispanics in the legal profession. Since Article 28 of the Arizona Constitution negatively impacts Hispanics, the present case is very important to the HNBA.

The *Language Rights Coalition* is a coalition of individuals and organizations dedicated to fighting all legislation that infringes on the linguistic integrity and civil rights of language minorities in the nation. The Coalition believes that Article 28, by imposing an official language on the population of Arizona, prevents the full participation of language minorities in the State's political life in contravention of the goals of the Coalition.

The *Massachusetts Association of Hispanic Attorneys* is a ten year old bar association that provides support and opportunities for Hispanic men and women who seek to study or practice law in Massachusetts. The organization is very concerned about the effect of laws like Article 28 on the linguistic integrity of its members and Hispanics generally and is, therefore, interested in the present

case.

The *Multicultural Education and Training Association, Inc.*, (META) is not-for-profit organization dedicated to promoting the educational and civil rights of language minorities. META is interested in the present case because Article 28 and laws like it, represent infringe on the civil and political rights of language minorities.

The *National Association for Bilingual Education* (NABE) is a national organization of bilingual educators that advocates for bilingual education and bilingual services as a means of promoting the linguistic integrity of the non-English speaking members of this nation. NABE is interested in opposing any efforts to make English the official language and is, therefore, interested in the outcome of the present case.

Founded in 1988, the *National Asian Pacific American Bar Association* is a national professional organization of Asian Pacific American attorneys, law professors and law students representing over 5,000 attorneys across the nation. The organization is very concerned about the effects of laws like Article 28 on the linguistic integrity of its members and is, therefore, interested in the present case.

The *National Association of Korean Americans* is a non-profit, national membership organization of Korean Americans. Its primary mission is to safeguard the civil rights of U.S. citizens and residents of Korean descent. It believes that Article 28 is a violation of the civil rights of Korean-Americans and is therefore interested in the present case.

The *National Korean American Service and Education Consortium, Inc.* (NAKASEC) is a not-for-profit organization founded by Korean American community organizations. NAKASEC seeks to enhance the lives of Korean Americans through education, advocacy, culture and service. NAKASEC believes that language rights are civil rights and that Article 28 discriminates against non-English speaking people including Korean Americans.



The *Organizations of Chinese Americans, Inc.* (OCA) is a national non-profit, non-partisan advocacy organization of concerned Chinese Americans and permanent residents. OCA's primary objectives include promoting active participation of Asian Americans in both civic and national matters; securing social justice, equal opportunity, and equal treatment of Asian Americans; eliminating prejudices, stereotypes and ignorance of Asian Americans and promoting the cultural heritage of Chinese and other Asian Americans. It believes that Article 28 is a violation of the civil rights of Chinese-Americans and is therefore interested in the present case.

## STATEMENT OF CASE

Article 28 was adopted by a slim majority of Arizona's voters in a 1988 ballot initiative known as Proposition 106. Article 28 makes English the official language of the "ballot, the public schools and all government functions and actions." Art. 28 § 1.(1)(2). It applies to "the legislative, executive and judicial branches of government...all political subdivisions, departments, agencies, organizations and instrumentalities of [the] state including local governments and municipalities." Art. 28 §1.(3)(a)(ii).

The measure not only regulates the language of state government, but also forecloses the passage of ameliorative legislation by local governments: "[N]o entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of languages other than English." Art. 28 §3.(1)(b).

The scope and application of Article 28 is extraordinarily broad encompassing every local and state employee from the neighborhood school teacher and the local justice of the peace to elected leaders of small towns and large cities. If allowed to stand, Article 28 would make its weight felt in every corner of Arizona; neither the intimate conversations between nurses and their patients nor the rhetorical pronouncements of elected leaders would be spared the chilling effect of its reach.

The limits of Article 28 are neither known nor are apparent from its language. It broadly requires that every level and branch of government, including every entity and person, " *act* in English and no other language." Art. 28 §3.(1)(a) (emphasis added). As the Court below found, it would prohibit a rabbi, who received his license from the State, from saying "mazel tov" at a wedding. *Yniguez v. Arizonans for Official English*, 69 F.3d. 920, 932 (9th Cir. 1995). If it withstands constitutional scrutiny, Article 28 would prohibit a school teacher from explaining to parents who did not understand English how their children are faring in school and would prohibit a State judge from using Latin in her decisions. Ironically, it would also prohibit the State from printing the phrase

*E Pluribus Unum* used by the proponents of Proposition 106 in the Arizona Publicity Pamphlet, an official State document accompanying the Proposition. *J.A. 29.* Tragically, it would also prohibit locally funded adult classes to learn English where the native languages of the pupils would be used.

One of the most pernicious features of Article 28 is that it gives any "person who resides or does business in [the] State" the right to sue to enforce its provisions. Art. 28 § 4. A doctor, nurse or teacher trying, in good faith to provide comprehensible information to the public could successfully be sued for the "offense" of speaking a language other than English. This extreme scenario certainly cannot be ruled out given the strong positions taken by the proponents of Proposition 106; *U.S. English* called for the end to all multilingual services that were not "essential" and other proponents equated patriotism with speaking English. *J.A. 31-32.*

Although Article 28 purports to govern the speech and acts of state and local employees, it is clear that its true target is the racial and ethnic language minorities of Arizona. The provision was publicized as a way to encourage "non-English speakers to learn English." *J.A. 29.* The constitutional amendment was intended to send a "clear and simple message - English is the official language of Arizona. To function and participate in our society, every resident must know English." *J.A. 26.*

It is also clear *who* it is that comprises Arizona's non-English speaking population - ethnic and racial language minorities. Out of Arizona's total population of 3.67 million, over 3.37 million speak English.[1] Over 8% of this population is considered limited English proficient because they do not speak

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[1] Economics and Statistics Admin., BUREAU OF THE CENSUS, *Census of Population: Social and Economic Characteristics: 1990* (Table 45)(Ariz, Sept. 1993) (CP-2-4).



English "very well."[2] Of this 8%, 64% are Latinos[3], 6% are Asian Pacific Islanders; and 20% are Native Americans.[4]

It is no coincidence that Article 28 impacts so heavily, almost exclusively, in fact, on racial and ethnic language minorities. Article 28 was not passed in a vacuum but at a time of increased national immigration that has caused anxiety amongst older, more established communities. Immigrants today, mostly Asians and Latinos, are viewed with the same kind of distrust and subjected to the same kind of restrictive laws as were immigrants in years past.[5] In fact, there are documented connections between proponents of official English legislation and anti-immigrant groups.[6]

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[2] *Id.*

[3] The term "Latino" is used to describe ethnic groups who are descended from inhabitants of Mexico, Puerto Rico, Cuba, Central or South America regardless of race.

[4] *Economics and Statistics Admin., BUREAU OF THE CENSUS, CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS: 1990 (Table 45)(Ariz, Sept. 1993) (CP-2-4).* If the language restrictions of Article 28 were applied nationally, millions of language minority Americans would be impacted. Nationwide, 13.9 million Americans over the age of five do not speak English "very well." Economics and Statistics Admin., BUREAU OF THE CENSUS, *Census of Population: Social and Economic Characteristics: 1990* (Table 40)(United States, Nov. 1993)(CP-2-1).

[5] Asians, Pacific Islanders and Latinos comprise approximately 60% of recent immigrants - *See*, U.S. Immigration and Naturalization Service, *Statistical Yearbook of the Immigration and Naturalization Service, 1992*, (Table D) U.S. Government Printing Offices: Washington, D.C. 1993.

[6] As John Tanton, former head of U.S. English, wrote in a confidential memo:

> *Gobernar es poblar* tanslates "to govern is to populate." In this society where the majority rules, does this hold? Will the present majority peaceably hand over its political power to a group that is simply more fertile? . . . Can *homo cantraceptivus*

The crucial link between national origin and language usage is the "Achilles heel" of language minorities and was exploited by the proponents of Article 28 in order to achieve the disenfranchisement of newcomers. Like anti-immigrant advocates of the past, proponents of Article 28 specifically harkened Arizona's voters back to some utopian time when immigrants came to America and quickly learned English and contrasted that vision with their conception of the present. *J.A. 26.*[7]

Proponents of the Proposition saw speaking any language other than English as signs of "ethnic separatism" and "ethnic distrust." *J.A. 26; J.A.* 31. It was these "ethnics" that had to be

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compete with *homo progenitiva* [sic] if borders aren't controlled? Or is advice to limit one's family simply advice to move over
and let someone else with greater reproductive powers occupy the space?. . . Perhaps this is the first instance in which those with their pants up are going to get caught by those with their pants down! . . .

> How will we make the transition from a dominant non-Hispanic society with a Spanish influence to a dominant Spanish society with a non-Hispanic influence? . . . As Whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion? . . . We're building in a deadly disunity.

Crawford, James, HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF 'ENGLISH ONLY' at 151 (Addison-Wesley Publishing Co. 1992)

[7] The proponents' vision of the past was clearly distorted. Each new wave of immigration brings up rosy-eyed versions of the past. For example, the Federal Immigration Commission issued a report in 1911 contrasting the then "old" and "new" immigrants. The report argued that the "old" immigrants had quickly mingled with native-born Americans and became assimilated, while "new" immigrants from Italy, Russia, Hungary and other countries were less intelligent, less willing to learn English , were not assimilating, and were criminally inclined. Leibowicz, Joseph, *The Proposed English Language Amendment: Shield or Sword?* 3 YALE LAW & POL'Y REV. 519, 536-537 (1985).



forced into conformity in order to preserve national unity. The Article punishes these citizens for not knowing English and prohibits bilingual government employees from using their language skills to assist these same ethnics.

## SUMMARY OF ARGUMENT

*Amici* respectfully urge this Court to review the First Amendment constitutionality of Article 28 with heightened scrutiny because its purpose and effect is to adversely impact racial and ethnic language minorities.

In reviewing the constitutionality of state regulations of speech, Courts have regularly examined the statute in a comprehensive manner that entails consideration of the context in which the law was created as well as its operation and effect. Despite the facial neutrality of laws, if the effect of a regulation falls most heavily on "disfavored" groups, then the state restriction is reviewed under heightened scrutiny.

Further, laws that create a structural barrier to the exercise of the political rights of minorities are also reviewed with greater suspicion. While governments may place restrictions on the public's access to the political process, if a state regulation uniquely burdens minorities, then Courts will look beyond the facial neutrality of the law and hold government to a high standard of justification.

In the present case, racial and ethnic language minorities, members of a disfavored group, are almost exclusively the victims of Article 28. This disparate negative impact is no coincidence. Instead, by exploiting the link between national origin and language usage, proponents of Article 28 intended to specifically burden racial and ethnic language minorities.

Indeed, Article 28 is part of an unfortunate national history of using content-neutral laws to attempt to marginalize language minorities. In reviewing these laws, this Court was cognizant of the context in which they were passed and on whom the burdens

of the laws would fall; the Court often brushed a veil of neutrality aside to expose the coercive agendas of these laws and strike them down as unconstitutional.

Article 28's disparate and purposeful impact on racial and ethnic language minorities and the traditional use of this type of law to alienate and punish minorities all coalesce to require this Court to apply a heightened scrutiny standard when it conducts its First Amendment review of this law. *Amici* believe that Article 28 will not survive such a review.

## ARGUMENT

### I

### THIS COURT MUST REVIEW THE CONSTITUTIONALITY OF ARTICLE 28 WITH HEIGHTENED SCRUTINY BECAUSE OF ITS ALMOST EXCLUSIVE IMPACT ON RACIAL AND ETHNIC LANGUAGE MINORITIES

*Introduction*

Respondents and other *amici* have ably demonstrated that Article 28 should be struck down because it violates the First Amendment rights of governmental employees and others. *Amici* fully agree and support their analysis. However, we write separately to assist the Court in understanding the discriminatory purpose of Article 28 and its impact on racial and ethnic language minorities.

The proponents of Article 28 campaigned for the provision as a measure to bar governmental employees from writing or speaking in any language other than English. While the law was ostensibly aimed at state and local employees, its purpose and effect was to punish non-English speakers as a means to coerce



them to learn English. The law is not benign. Artucle 28 makes it impossible for non-English speakers making it impossible for them to communicate with their government and isolating them from the political discourse and the political process generally.

Because racial and ethnic language minorities, primarily Latinos, Asians and Native Americans, are almost the only ones impacted by the law, this Court must use heightened scrutiny in its First Amendment analysis of Article 28.

*Amici* submit that Article 28 cannot withstand that scrutiny.

*A. This Court Must Review Article 28 Under Heightened Scrutiny*

Although the First Amendment is most often used to protect the content of speech, or a viewpoint, it also protects speech from the "operation and effect" of statutes which, while facially neutral, have a disparate impact on disfavored groups. *See, Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931). Indeed, "naked restrictions on the dissemination of ideas," *Martin v. Struthers*, 319 U.S. 141, 147 (1949), can be achieved with content-neutral laws as easily as with those consciously attempting to restrict a particular viewpoint. *Id.*

> [C]ommon sense drives the point home: however neutral the government's intentions in enacting a law, the operation of that law may have a vastly uneven impact. There is no equality in a law prohibiting both rich and poor from sleeping under the bridges of Paris; there is no equality in law prohibiting anonymous pamhleteering by both popular and unpopular groups, *see, Talley v. California*, 362 U.S. 60, (1960).

*NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984).

Despite the facial neutrality of a law, if its impact falls most heavily on disadvantaged or unpopular groups, courts must

view the law with greater suspicion and hold the government to a high standard of justification. *Id.* Indeed, as the lower Court in this case stated:

> The speech of unpopular groups, of course, often meets with hostility and repression, though it is more commonly the message that is targeted than the language in which it is communicated. Given the link between unpopular speech and unpopular groups, it is not surprising that even some of our most venerable First Amendment precedents have an (albeit implicit) equal protection component.

*Yniguez* 69 F.3d at, 948, n.33 (cites omitted).

For instance, in *City of Richmond*, the NAACP brought an action challenging the constitutionality of Richmond's parade ordinance that required 20 days advance notice before a parade or demonstration could be held. The civil rights organization wanted to hold a timely march after the City decided not to investigate the suspicious death of a black man in the custody of police. *Id.* at 1349.

The Ninth Circuit found that the effectiveness of a demonstration to a large extent depend upon the it timing and forum. *Id.* at 1356. The unreasonably long advance notice requirement, it reasoned, effectively denied organizations like the NAACP the ability to hold spontaneous demonstrations and marches in response to perceived injustices.

After concluding that the parade ordinance was facially content neutral, the Court found that the cities must "go a great distance" in order to justify its law because it fell most heavily on a "disfavored" group who was more likely to need to demonstrate on short notice. *Id.* at 1356. *See also, Asian American Business Group v. City of Pomona*, 716 F. Supp. 1328 (C.D.Cal 1989)

In the present case, it is the ability of Latinos, Asians and Native Americans, the largest language minority groups in



Arizona, to communicate with their government that is being suppressed. It is their First Amendment right to "give and receive information" that is at stake. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976). *See also, Board of Educ., Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 866-68 (1982); *Meyer v. Nebraska*, 262 U.S. 390 (1923)(where law struck down partly because it interfered with students' right to acquire knowledge); *Bartels v. Iowa*, 262 U.S. 404 (1923).

As the Court below found, by banning the use of "entire vocabularies" in governmental speech, Article 28 "bars or significantly interferes with the ability of the non-English speaking populace of Arizona to 'receive information and ideas.'" *Yniguez*, 69 F.3d at 935, 941, *citing to, Virginia Citizens, supra*. Indeed, Article 28 strikes at the heart of the "natural right of the members of an organized society, united for their common good to impart and acquire information about their common interests," which is the heart of the First Amendment. *Grosjean v. American Press Co*, 297 U.S. 233, 243 (1935).

It is the disparate impact of this denial of First Amendment rights on such distinct, relatively small and marginalized groups[8], however, that the lower Court here found so deplorable:

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[8] Those who speak a language other than English in America, primarily Latinos, Asians, and Native Americans, are members of ethnic groups that bear the insignia of being "discrete and insular" minorities; they are readily identifiable and saddled with a history of exclusion from American society which makes legislation that adversely impacts their rights particularly suspect. *See, U.S. v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 *(1938); San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 294, n.34 (1978); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). *See also, Cisnero v. Corpus Christi*, 467 F.2d 142, 149 (5th Cir. 1972); *U.S. v. Texas Education Agency*, 467 F.2d 848, 861 (5th Cir. 1972); *U.S. v. Test*, 550 F.2d 577, 585-586 (10th Cir. 1972); *U.S. v. Texas*, 342 F. Supp. 24, 26 (E.D. Texas, 1971); *Bokulich v. Jury Commission, Alabama*, 298 F. Supp. 181, 190 (N.D. Ala., 1968).

> We note that the adverse impact of Article 28's overbreadth is especially egregious because it is not uniformally spread over the population but falls almost entirely upon Hispanics and other national origin minorities.

*Yniguez*, 69 F.3d at 947 (cites omitted). Not only are language minorities most heavily impacted by Article 28, but the whole purpose of the law was to impact on this group.

Like the parade ordinance in *Richmond*, Article 28 is facially neutral. However, the *Richmond* Court did not end its analysis there. Instead, it examined the impact of the law, recognized its adverse effect on disfavored groups and used the knowledge of that effect to hold the city to a high standard of justification.

Similarly, this Court must cut through the veil of Article 28's neutrality, recognize that it impacts virtually *only* on language minorities and treat the law as what it really is -- a purposeful attempt to disenfranchise language minorities by eliminating their ability to communicate with their government.

*B. The Purpose and Effect of Article 28 is to Punish Racial and Ethnic Language Minorities.*

1. Non-English speakers are overwhelmingly of foreign national origin or are ethnic minorities.

Arizona's foreign-born population, racial and ethnic minorities, are the true target of Article 28. It is evident from the campaign literature for Proposition 106, that the link between foreign national origin and English language proficiency was used by the proponents of Article 28 in their appeal to Arizona's voters. Not only did its proponents argue for the need for new citizens to learn English but they also argued that:

> The state of Arizona is at a crossroads. It can move towards the fears and tensions of language rivalries and ethnic distrust, or it can reverse this trend and strengthen our common bond, the English language.



*J.A. 26* This race-based forecast of conflict with language minority communities attributed to non-English speakers the propensity to destroy Arizona's social fabric. By linking language and ethnicity in the same breath and characterizing language minorities as a social threat, Article 28's proponents belied their own claims of benign motivation. This intentional impact on ethnic and racial minorities confirms the concern this Court expressed in *Hernandez v. New York*, 500 U.S. 352 (1991):

> It may well be, for certain ethnic groups and in some communities, that *proficiency in a particular language, like skin color, should be treated as a surrogate for race* under an equal protection analysis.

*Hernandez* at 412-3 (emphasis added). The *Hernandez* Court recognized the obvious -- the connection between language usage and certain racial and ethnic groups. *See Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528 (1926) (equal protection denied to Chinese merchants who kept records in their native tongue); *see also*, *Hernandez v. Texas*, 347 U.S. 475, 480 n.12 (1954) (Spanish surnames "provide ready identification of the members of this [Mexican-American] class") and *Castaneda v. Partida*, 430 U.S. 482, 486 n.5 (1977) (Mexican-American ethnicity synonymous with "[p]ersons of Spanish language"); *Lau v. Nichols*, 414 U.S. 563, 568-9 (1974) (non-English speaking Chinese students subjected to national origin discrimination in violation of Title VI of the Civil Rights Act of 1964).[9]

---

[9] Other courts and agencies have also recognized the close association between an individual's primary language and national origin. *See e.g., Fragante v. City and County of Honolulu*, 888 F.2d 591, 595 (9th Cir. 1989) (citing with approval to EEOC Title VII guidelines, 29 C.F.R. § 1606.1 *et seq.*, defining national origin discrimination to include discrimination "because an individual has the . . . linguistic characteristics

2. Courts have closely examined the purpose and effect of facially neutral language restrictions.

Article 28 is another chapter in our nation's sad history of using language restrictions to punish and alienate ethnic and racial language minorities.[10] All too often, whenever language minorities

---

of a national origin group."); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1039 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989) ("[t]he cultural identity of certain minority groups is tied to the use of their primary tongue," and "rules which have a negative effect on bilinguals . . . or non-English speakers, may be mere pretexts for intentional national origin discrimination."); *United States v. Alcantar*, 897 F.2d 436, 440 (9th Cir. 1990) ("we have previously recognized how closely tied Spanish language is to Hispanic identity"); *Carino v. Univ. of Oklahoma*, 750 F.2d 815, 819 (10th Cir. 1984) (accent discrimination equivalent to national origin discrimination); *Olagues v. Russoniello*, 797 F.2d 1511, 1521 (9th Cir. 1986), *vacated as moot*, 484 U.S. 806 (1987) (same); *Berke v. Ohio Dept. of Pub. Welfare*, 628 F.2d 980, 981 (6th Cir. 1980) ("persons of different nationalities are often distinguished by a foreign language"); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1978) ("This circuit recognized Spanish speaking or Spanish-surnamed Americans as a minority for purposes of Sections 1981, 1983 and 1985(3)"); *Hernandez v. Erlenbusch*, 368 F. Supp. 752, 755 (D. Or. 1973) (tavern's rule against speaking foreign languages tantamount to racial discrimination against Mexican-Americans). *Cf. Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983); *Frontera v. Sindell* 533 F.2d 1215 (6th Cir. 1975); *Carmona v. Sheffield*, 475 F.2d. 738 (9 Cir . 1971) finding that language use alone does not identify members of a suspect class.

[10] Restrictive language policies were first used against Native Americans. The Federal government, in the late 1870's, attempted to "civilize" Native Americans and acclimate these nomadic people to reservation life. The government instituted policies ending bilingual education programs in reservation schools and forcibly removed Native American children from their homes. The government also established "Indian boarding schools" for these children where their mouths would be washed out with soap for speaking in the "barbarous" dialects of their native tongues. *See*, Crawford, James, BILINGUAL EDUCATION:



have become unpopular, attempts have been made to marginalize them by exploiting their need to communicate in languages other than English. These attempts usually took the form of facially neutral laws that prohibited the use of *any* language other than English, not just the language of the disfavored group. This Court, however, regularly saw through this facial neutrality and examined the laws within the context in which they were created and whom they effected. This Court should continue this tradition today.

During World War I, anti-foreigner, and especially anti-German, sentiment crested, leading to the adoption of legislation in fourteen states prohibiting the teaching of modern foreign languages by fourteen states.[11] In *Meyer v. Nebraska*, 262 U.S. 390 (1923) this Court recognized that restrictions on non-English languages most often were simply attempts to discriminate against unpopular minorities. Commenting on Nebraska's law which made it unlawful to teach in non-English languages, the Court noted that the Nebraska Supreme Court found that the "law affects few citizens except those of foreign lineage." *Id.* at 398. The Court also recognized that:

> The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war, and aversion to every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the

---

HISTORY, THEORY, POLITICS AND PRACTICE, 3rd ed. at 25-26 (Bilingual Education Services 1995). Congress recently found that past federal policy lead to "acts of suppression and extermination of Native American languages and cultures, *Native American Languages Act*, 25 U.S.C. § 2809 (1990), that is only now being remedied.

[11] Leibowitz, Arnold H., *English Literacy: Legal Sanction For Discrimination*, 45 NOTRE DAME LAWYER 7 (Fall 1969) at 22, n.138.

> limitations upon the power of the state, and conflict with rights assured to plaintiff in error.

*Id.* at 402.

In 1927, this Court was again called upon to review the constitutionality of legislation, which this time brought foreign language schools in Hawaii under such strict governmental regulation that the schools would be required to close. *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927). Although the legislation did not target any particular language for special restriction, the Court noted that over two-thirds of the schools taught Japanese and that over the previous twenty years the number of Japanese pupils in the public and private schools generally had increased exponentially. *Id.* at 291. The asserted goals of the law was to "fully and effectively regulate the conducting of foreign language schools and the teaching of foreign languages, in order that the Americanism of the pupils be promoted." *Id.* at 293.

In striking down the legislation as unconstitutional, the Court emphasized that,

> The Japanese parent has the right to direct the education of his own child without unreasonable restrictions, the Constitution protects him as well as those who speak another tongue.

*Id.* at 298-99.

Similarly, in *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926), the Court struck down a Philippine law that required business owners to keep their financial records in English, Spanish or other local dialects, which local Chinese merchants could not read or write. Of the 85,000 merchants in the Philippines to whom the bookkeeping law applied, only the 12,000 Chinese merchants could not comply. *Id.* at 512. The Philippines justified the law based on their need to inspect the books of merchants to ensure that they were paying appropriate taxes. *Id.* at 514. The Court found that the law was "obviously intended chiefly to affect



[the Chinese] as distinguished from the rest of the community." *Id.* at 528. The Court also noted that public opinion can be easily swayed and the police power of a state or territory used to repress unpopular groups. "Happily for all", stated the Court, "the fundamental guaranties of the Constitution can not be freely submerged if and whenever some ostensible justification is advanced..." *Id.* at 527.

In all of these cases, a fear or animus toward a particular group lead governments to develop restrictive legislation that attempted to achieve unity by prescribing orthodoxy. In each case, this Court found those restrictions to be in violation of this nation's general tradition of tolerance and its Constitution. *See also, Epperson v. Arkansas*, 393 U.S. 97, 105 (1968) (where the language restriction in *Meyer* was described as designed to "promote civic cohesiveness by encouraging the learning of English".)

As Justice Jackson stated speaking for this Court:

> National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.
>
> Struggles to coerce conformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. ...Compulsory unification of opinion achieves only the unanimity of the graveyard.

> It seems trite to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-41 (1943).

Article 28 was promoted as enabling the State to protect "democracy by encouraging 'unity and political stability'; encouraging a common language; and protecting public confidence". Regardless of the merits of these goals, by reviewing Article 28 under the strictest First Amendment scrutiny, this Court would be following its considerable and noble precedent which in the past has prevented sporadic, nativist sentiment from turning this country toward deprivations of liberty and equality and away from its spirit of tolerance and freedom.

*C. Article 28 Not Only Impacts On Racial and Ethnic Minorities but Creates a Structural Barrier to Their Exercise of Political Rights.*

This Court should review Article 28 under heightened scrutiny not only because ethnic and racial minorities are being targeted but also because the nature of the harm leads to the political disempowerment of an entire group. Just as this Court has examined the operation and effect of content-neutral speech restrictions, this Court has also looked at the impact of facially neutral laws which effect access to the political process and used heightened scrutiny when the rights of minorities were disproportionately burdened.

Article 28 prohibits any public entity, including local and state legislatures from "mak[ing], or enforc[ing] law, order, decree or policy which requires the use of a language other than English." Article 28, § 3.1. Like the initiative struck down in *Romer v. Evans*, 64 U.S.L.W. 4353 (U.S. May 20, 1996), Article 28 precludes language minorities from seeking remedial or beneficial



legislation through the normal political process either at the state or local level. Unlike any other group, language minorities must attempt another constitutional amendment in order to undo the harmful effects of Article 28.

The imposition of such a disability on a discrete group, identifiable by a single trait is particularly heinous. As this Court stated in *Romer*: "[the] sheer breadth [of Amendment 2] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects," 64 U.S.L.W. at 4356.

Indeed this Court has often struck down laws where there was a particularly deleterious *effect* on the political rights of racial or ethnic minorities. For instance, in *Hunter v. Erickson*, 393 U.S. 385 (1964) this Court found that minorities' rights to equal access to the political process could not be unduly burdened. In that case, the City of Akron amended its charter to not only nullify a fair housing ordinance but to also make it more difficult to pass another ordinance like it. The Court found this simply impermissible. The Court stated:

> [T]he Akron charter obviously made it substantially more difficult to secure enactment of ordinances subject to [the amendment]....Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, *the reality is that the law's impact falls on the minority*...[the amendment] places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others.

*Id.* at 390-91 (emphasis added). *See also, Reitman v. Mulkey*, 387 U.S. 369 (1967) (where this Court overturned a state constitutional amendment that sought to overturn legislation barring racial discrimination in housing. In doing so it undertook an analysis of the amendment "in terms of its 'immediate objective,' its 'ultimate effect' and its historical context and the conditions existing before

its enactment.'" *Id.* at 373.)

The same reasoning was used in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) to invalidate a state initiative that overturned local school district's desegregation plans. The Court stated that the Equal Protection Clause goes beyond simply guaranteeing voting rights to reach, "'political structure[s] that treat all individuals as equals'...yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* at 467 (cite omitted). Although governments may make it difficult generally for its citizens to enact laws or "allocate governmental power on the basis of any general principle," using "the racial nature of an issue" to determine the governmental decisionmaking structure, imposes "substantial and unique burdens on racial minorities." *Id.* at 470, citing to *Hunter v. Erickson* (Harlan, J. concurring).

Of special importance to the instant case as well is the Court's acknowledgement in *Washington* that although the initiative was facially neutral, there was "little doubt that the initiative was drawn for racial purposes." *Id.* at 471. The Court relied upon the fact that the initiative would have no effect except on districts with mandatory busing plans and the statements made by the proponents of the initiative.

Similarly, Article 28 would have an effect only on language minorities. Further, the proponents of Article 28 have made it abundantly clear that that effect was deliberate. As in *Romer*, the present case is a situation where a state is making a "class of persons a stranger to its laws." *Romer* 64 U.S.L.W. at 4357. There is no alternative way for language minorities to effectuate their political goals except by initiating another constitutional battle where their minority interests have little hope of being effectuated. By imposing the English language on its residents through constitutional provision, Arizona is not only setting up a procedural burden on the passage of beneficial legislation for language minorities but also places a structural burden on "minority participation in the political process.



*Washington* at 913, fn. 23.

## CONCLUSION

Article 28 was passed in Arizona amidst a growing national furor against immigrants from Mexico, Latin America and Asia. The proponents of the measure boldly exploited these sentiments by creating a spectre of ethnic disunity if Proposition 106 was not passed.

Although the law is ostensibly aimed at the speech of state and local employees, it is clearly the non-English speaking populace of Arizona that was its true target and who will be most harmed by the implementation of the law. By telling non-English speaking citizens that they must communicate with government only in English, Article 28 subjects these citizens to virtually complete social and political isolation. Unfortunately, these kinds of attempts to compel uniformity have been made in the past against whatever group was currently disfavored.

This Court has often intervened on behalf of the minority and saved the honor of our Constitution from the vagaries of tyrannical majorities. In the present case, this Court is called upon to do the same. Following the wisdom displayed in cases from *Meyer* to *Romer*, this Court must look beyond the apparent neutrality of Article 28 to consider its true agenda and its impact on racial and ethnic language minorities. Once it does, *amici* are confident that this Court will find that Article 28 violates the First Amendment.

For all of the foregoing reasons, *amici* respectfully request that this Court affirm the Ninth Circuit's decision.

Dated: New York, New York
July 25, 1996

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In The

# Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH, ET AL.,

*Petitioners,*

vs.

ARIZONA, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS YNIGUEZ AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING

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## INTEREST OF AMICUS CURIAE

This case concerns Article XXVIII of the Arizona Constitution which declares English to be the "official language" of the state and requires all Arizona officials and employees performing Government business to "act" only in English.[1] In effect, Arizona seeks to impose "English Only" requirements on sovereign Indian tribes located within the boundaries of the State,[2] including one of the largest American Indian tribes, the Navajo Nation.

The Navajo Nation is a federally recognized Indian tribe, comprised of more than 200,000 members and occupying approximately 25,000 square miles of trust lands spanning 11 counties in three states, Arizona, New Mexico, and Utah.[3] The Navajo Nation exercises nearly exclusive jurisdiction within its territorial boundaries, and provides a wide variety of governmental services throughout its jurisdiction.

---

[1] Section 1(2) states that English "is the language of the ballot, the public school and all government functions and actions."

[2] According to the 1994-1995 "Arizona State Land Department Annual Report," twenty percent of the land in Arizona is Indian trust lands.

[3] Navajo Nation Division of Community Development, *1990 Census Population and Housing Characteristics of the Navajo Nation* (1993), at 28.

The United States recognized the authority of the Navajo Nation over lands reserved for the Navajo people in the Treaty of June 1, 1868, United States-Navajo Tribe, 15 Stat. 667. *See* also, *Williams v. Lee*, 358 U.S. 217 (1959).

Article XXVIII directly impacts the free speech of members of the Navajo Nation who are elected to political offices in Arizona and those who are employed by the State, including teachers in public schools located in the Navajo Nation or in nearby towns. Article XXVIII also has the effect of preventing the Navajo Nation from carrying out its own laws and policies concerning the preservation and utilization of the Navajo language.[4] It has

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[4] 10 N.N.C. § 111 **Education in Navajo language**

> The Navajo language is an essential element of the life, culture and identity of the Navajo People. The Navajo Nation recognizes the importance of preserving and perpetuating that language to the survival of the Nation. Instruction in the Navajo language shall be made available for all grade levels in all schools serving the Navajo Nation. Navajo language instruction shall include to the greatest extent practicable: thinking, speaking, comprehension, reading and writing skills and study of the formal grammar of the language.

1994 Navajo Nation Long-Range Navajo Language Goals, established by Resolution EC-MY-46-94 (May 27, 1994), of the Education Committee of the Navajo Nation Council:

> It is the policy of the Navajo Nation to work towards the acceptance of the Navajo language in all areas of contemporary Navajo life, and the prohibition of the Navajo language in none.
>
> Navajo will be taught and used in schools as a **living** language; students, staff, and parents will use Navajo as a language of instruction, communication and interaction.

Navajo Nation President Executive Order, "Relating to the Usage of the Navajo Language as the Language of Instruction at all Navajo Nation Head Start Facilities," July 31, 1995.



destructive cultural consequences similar to the devastating results of an earlier (now repudiated) federal Indian policy of assimilation.[5] The enforcement provision offers sweeping opportunities for punishing Navajo public service employees who speak Navajo while performing Arizona government business.[6]

Contract relationships between Arizona and the Navajo Nation will be necessarily implicated by Article XXVIII, e.g., development of child support enforcement agreements for payments under the Arizona Health Care Cost Containment System ("AHCCCS"), A.R.S. § 36-2901 *et seq*. and Title XIX of the Social Security Act, 42 U.S.C.A. § 301 *et seq*. In many cases, the State contracts with the Navajo Nation to provide these services. When the Navajo Nation acts as an agent for the state to provide certain services it does so to insure that impacted sectors of the Navajo Nation effectively receive this assistance.

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[5] Education was considered the cornerstone of assimilation, the 19th century federal policy which was premised on "civilizing" young American Indians by forcing them to speak English and to adopt the ways (including the language) of the predominant ("civilized") culture. "Thus began a federal initiative in cultural genocide, an explicit policy of remaking the Indian in the white man's image." James Crawford, *Hold Your Tongue: Bilingualism and the Politics of "English Only"*, Addison-Wesley Publishing Co. (1992), at 44.

[6] **Enforcement; Standing.**

> Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

Article XXVIII acts to destroy the effectiveness of the Navajo Nation in providing such services, particularly to those members of the Navajo Nation who would otherwise be denied assistance because of language issues.

The Navajo Nation is filing this *Amicus Curiae* brief pursuant to United States Supreme Court Rule 37(4), which does not require the consent of the parties.

## STATEMENT OF FACTS

Long before the first English-speaking immigrants arrived, American Indian nations were the aboriginal occupants of this land.[7] It is estimated that between 500 and 1,000 indigenous tongues were spoken in North America when white settlers arrived.[8] This number has been dramatically reduced since that time.[9] However, the Navajo language is currently utilized by the vast majority

[7] Quoting President Franklin D. Roosevelt, who once remarked, "all of our people all over the country, all except the pure-blooded Indians, are immigrants or descendants of immigrants, including those who came over on the Mayflower," the 9th Circuit noted that, "this country has historically prided itself on welcoming [other] immigrants with a spirit of tolerance and freedom. . . . " *Yniguez, et al. v. Arizonans for Official English, et al.*, 69 F.3d 920, 948 (9th Cir. 1995).

[8] Crawford, at 34-35.

[9] "Linguistic self-determination is also a matter of growing concern to American Indians. While an estimated 206 indigenous languages still survive in the United States, a majority of these are in extremely poor health, spoken by dwindling groups of elders." Crawford, at 245.



of the Navajo people, including many elders who speak only Navajo, and is an essential element of the government, culture and customs of the Navajo Nation.[10]

Ironically, because Article XXVIII has the effect of discouraging usage of the Navajo language, it has the potential for destroying an invaluable asset in the preservation of democracy. Thus, rather than protecting democracy (a stated goal of the Article's proponents), it may very well have the opposite effect. Utilization of indigenous languages, and the Navajo language in particular, has a distinguished history in the military annals of the United States. Combat communications using indigenous languages were an essential aspect of the success of the United States military efforts during World War II.[11] Arizona, New Mexico, and the United States have all acknowledged the critical contributions of Navajo servicemen in the United States Marines ("Code Talkers") who effectively used the Navajo language in coded communications during World War II.[12] Unlike English language codes, the Navajo code was never broken by

[10] Navajo Nation Division of Community Development, *1990 Census Population and Housing Characteristics of the Navajo Nation* (1993).

[11] Alison R. Bernstein, *American Indians and World War II*, Univ. of Oklahoma Press, (1991), at 46-49.

[12] This recognition includes the following proclamations:

Navajo Code Talker's Day in Arizona on January 30, 1982, proclaimed by the Arizona Governor. *Navajo Times*, p. 14, 1-13-82.

Navajo Code Talker's Day in New Mexico on April 10, 1982, proclaimed by the New Mexico Governor. *Navajo Times*, 4-14-82.

National Navajo Code Talkers Day (August 14th – the anniversary date of the Japanese surrender) proclamation

Japanese cryptologists and was a vital element of the United States military success in the Pacific.[13]

The Navajo language is integral to an understanding of Navajo culture.[14] Language is the vehicle through which history, religion, custom and tradition are taught, and thus is not a neutral instrument, but a conveyor of values.[15] Navajo religious ceremonies require a profound

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signed by the President of the United States on July 28, 1982. McClain, *Navajo Weapon*, pp 235-237.

[13] See generally, Sally McClain, *Navajo Weapon*, Books Beyond Borders (1994); Doris Paul, *The Navajo Code Talkers*, Dorrance Publishing Co. (1973).

[14] "We, the Navajo people, were very fortunate to contribute our language as a code for our country's victory. For this I strongly recommend we teach our children the language our ancestors were blessed with at the beginning of time. It is very sacred and represents the power of life." Kee Etsicitty, Code Talker, 3rd Division, quoted in McClain at v.

[15] "Navajo elders taught me that language is the controlling factor in one's life. It is sacred, and that requires Navajos to become familiar with their language and how words are used. . . . 'Power' is a linguistic issue. In the Navajo language, words are 'powerful,' but it is wrong to use them to exert power over others." Unpublished Paper by Esther Yazzie, Navajo Language Interpreter for the United States District Court, District of New Mexico, "Native Americans in Native Studies: Toward the End of Marginalization" (Spring 1995).

"Coercive anglicization has taken more from Native Americans than a set of linguistic skills. It has isolated them from cultural resources they need to define themselves, leaving many unprepared to enter a wider society, still far from color-blind, that is likely to reject them regardless of their English-speaking ability." Crawford at 248.

On June 19, 1996, a Memorandum of Understanding was signed by the Navajo Nation and the Federal National Mortgage



understanding of the language in order to accurately describe both to whom a prayer is offered, and the appropriate supplication.[16] Similarly, an explanation of the complex Navajo family clan system, through which individuals understand and define who they are, also requires Navajo language proficiency.[17] Navajo is the primary language of the Courts of the Navajo Nation and the principal means of conveying traditional values and customary law.[18]

Article XXVIII forbids Navajo teachers in all public schools from speaking in the Navajo language to Navajo school children, and their families, except to teach Navajo as a "foreign" language or as a means of teaching English. As a result, Navajo children could be deprived of

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Association ("Fannie Mae"), implementing a housing initiative in the Navajo Nation with standard mortgage and note forms which require an oral Navajo language translation whenever notice is given. Fannie Mae thus recognized the critical importance of the Navajo language in understanding these documents and the rights and responsibilities conveyed through them. Resolution IGRMY-116-96 of the Intergovernmental Relations Committee of the Navajo Nation Council (5-20-96).

[16] "The Navajo language was given to us by our Great Spirit and we are to use that [language] to communicate to Him through prayer." Harry Tome, Navajo elder and member of the Native American Church, "NAC to Promote, Preserve, Protect Our Culture," *Navajo Times*, June 20, 1996, at A-5.

[17] Robert Yazzie, Chief Justice, Supreme Court of the Navajo Nation, " 'Life Comes From It': Navajo Justice Concepts," 24 N.M. L. Rev. 175, at 182 (Spring 1994).

[18] Tom Tso, Former Chief Justice, Supreme Court of the Navajo Nation, "The Process of Decision Making in Tribal Courts," 31 Ariz. L. Rev. 225-36 (1989). "Navajos have survived since before the time of Columbus as a separate and distinct people. What holds us together is a strong set of values and customs, not words on paper."

critical opportunities to speak and to be spoken to in their own indigenous language and through that language, to learn the teachings of the Navajo culture. The resulting message to Navajo children (i.e., Navajo is a second class language, school is a place where you must speak English, not Navajo, use of the Navajo language must be restricted) is similar to the boarding school teachings of the late 19th and early 20th centuries, the ultimate result of which is a modern day initiative in cultural genocide.[19]

Currently, two-thirds of Navajo school children attend public schools in the Navajo Nation, or in border towns.[20] A number of state offices with largely Navajo service populations are located in the Navajo Nation[21] or in nearby towns.

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[19] "Off-reservation federal boarding schools were founded in 1879. . . . [as a means of completely removing Indian youth] from the family and the barbarism of tribal life. . . . Anthropologist Peter Farb described the boarding school experience:

> The children usually were kept at boarding school for eight years, during which time they were not permitted to see their parents, relatives, or friends. Anything Indian – dress, language, religious practices, even outlook on life . . . was uncompromisingly prohibited.

Felix S. Cohen's *Handbook of Federal Indian Law*, Michie Co. (1982 Ed.) at 140, n. 126 (citations omitted).

[20] Navajo Division of Education, *Statistics on Navajo (Diné) Education 1994-1995*, (May 1995) at 164-168. There are 57 public schools in the Navajo Nation (33 of them in the Arizona portion of the reservation).

[21] According to Navajo Communications Co., Window Rock, Navajo Nation (Arizona), there are 29 state and county offices located in the Navajo Nation, providing services primarily to Navajos.



The Navajo Nation government has repeatedly expressed opposition to "English Only" initiatives, both at the state and federal levels.[22] Federal policy affirmatively supports Indian control of Indian education and the preservation of indigenous languages as an integral aspect of tribal self-determination.[23] Although one of the stated exceptions to Article XXVIII is "to comply with other federal laws,"[24] there is no exception for compliance with tribal laws. The blend of federal Indian law and

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[22] **Navajo Nation Council Resolution CJY-34-88:** Opposing Passage of Proposition 106 which would mandate English as the official language of the State of Arizona (7-29-88); **Navajo Nation Council Resolution CO-98-95:** Requesting the United States Congress to Oppose the Proposed "English-Only" Legislation . . . and to Support the Concurrent "English Plus Resolution," H.Con.Res. 83. . . . (10-24-95); **Intergovernmental Relations Committee Resolution IGRJA-9-96:** Strongly Opposing the "English Only" Legislation and the Amendments Intended to have Native Americans accept such legislation. . . . (1-22-96); **Navajo Nation Council Resolution CAP-35-96:** Opposing proposed Congressional Actions Implementing "English Only" Policies (4-18-96).

[23] 25 U.S.C. § 2011: **Policy for Indian control of Indian education**:

> (a) **Facilitation of Indian control**. It shall be the policy of the Secretary [of the Interior] and the Bureau [of Indian Affairs], in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education.
>
> (b) **Consultation with tribes**. (1) All actions under this Act shall be done with active consultation with tribes.

Native American Languages Act of 1990, 25 U.S.C. § 2901, *et seq.*

[24] Arizona Constitution, Article XXVIII, § 3(2)(b).

policy makes the exception for such compliance difficult to interpret. In addition, the combination of tribal, federal and state law issues in the provision of services to American Indians, makes the likelihood of misinterpretation of the statutory exception to the detriment of the Navajo people and other Indians in Arizona almost inevitable.

## SUMMARY OF ARGUMENT

When first encountered by Europeans, American Indian people were sovereign under the same principles of natural law upon which our democratic form of government is founded. From the earliest contact, European powers, and later the United States, recognized the national character of Indian tribal governments through treaties. Treaties between the United States and Indian tribes,[25] and implementing federal legislation,[26] provide that the internal affairs of Indian people shall remain exclusively within the jurisdiction of the Indian tribal governments.[27] Because treaties with Indian nations were

[25] See, e.g., Treaty of September 9, 1849, United States-Navajo Tribe, 9 Stat. 974; Treaty of June 1, 1868, United States-Navajo Tribe, 15 Stat. 667.

[26] E.g., the Indian Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729 (codified as carried forward and amended in 25 U.S.C. § 177), made applicable in Arizona by the Act of February 27, 1851, ch. 14, § 7, 9 Stat. 574, 587.

[27] *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 174-75 (1973) (construing the 1868 Navajo Treaty); *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347-348 (1941); *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515, 555, 556-557, 559-561, 581-582 (1832); *The Seneca Lands*, 1 Op.Atty.Gen. 465, 467 (1821).



written in a language foreign to the Indian people,[28] long-standing canons of construction require that these English-language treaties be construed as the Indian people themselves understood them,[29] that they be given a liberal interpretation,[30] and that ambiguous expressions be resolved in favor of the Indians.[31]

The United States has a trust obligation to American Indian tribes based upon the relationships established in these treaties, the Indian Commerce Clause of the United States Constitution,[32] which vests exclusive authority over Indian affairs in the United States Congress, and federal laws enacted pursuant to such federal congressional authority. This Court repeatedly has acted to uphold and protect the sovereignty of Indian nations, particularly the authority of Indian tribal governments to govern their lands and people free from state interference.[33] Federal law and policy strongly support the

[28] "That's what our treaties were. Pieces of paper written in a language we didn't understand and read to us by people we didn't trust." Kent Nerburn, *Neither Wolf Nor Dog*, New World Library (1994), at 139.

[29] *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970); *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) at 581-582.

[30] *Antoine v. Washington*, 420 U.S. 194, 200 (1975); *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

[31] *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973); *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

[32] Art. I, § 8, Cl. 3.

[33] E.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973); *Warren Trading*

exercise of inherent sovereign powers of self-government of Indian people by their elected tribal governments, including the preservation of tribal history, culture, religion, and language.[34]

Article XXVIII violates the First Amendment to the United States Constitution, by impairing the right of Indian people to exercise protected speech. It acts to deprive American Indian people in Arizona of the ability to preserve and protect the indigenous languages upon which their tribal cultures, religion and traditions depend. In addition, Article XXVIII violates the Fourteenth Amendment to the United States Constitution, by discriminating against American Indian people in Arizona based upon national origin.

Article XXVIII has the effect of frustrating the strong federal policy supporting preservation of tribal governments, cultures, and languages. As a result, Article XXVIII violates the treaties between the United States and Indian nations and the federal legislation implementing those treaties.

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*Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959).

[34] Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479; Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341; Indian Self-Determination and Education Act of 1975, 25 U.S.C. §§ 450-450n; American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978); Bilingual Education Act of 1978, 25 U.S.C. §§ 3221-3261; Native American Languages Act of 1990, 25 U.S.C. §§ 2901-2906 (1990); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 106 L.Ed. 343, 369 n.3 (1989).



Article XXVIII results in less effective, more oppressive State government, which specifically, unfairly and unlawfully negatively impacts American Indian people in Arizona. Thus, the decision of the Ninth Circuit Court of Appeals that Article XXVIII is unconstitutionally overbroad should be affirmed.

## ARGUMENT

### I. ARTICLE XXVIII VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION BY UNLAWFULLY IMPAIRING THE FREE SPEECH INTERESTS OF THE NAVAJO NATION, OTHER INDIGENOUS AMERICAN INDIAN NATIONS, AND OTHER NATIONAL ORIGIN GROUPS IN ARIZONA

Nothing less than the right to speak in an indigenous tongue is at stake in this case. Article XXVIII seeks to deny that right to the indigenous people of Arizona, and to their sovereign Indian governments by commanding the use of English.[35] In hundreds of State offices and public schools located within the Navajo Nation, Navajo employees are prohibited from speaking to Navajo constituents, students and their families in the Navajo language. It could not be more obvious that the denial of such speech is a profound violation of the free speech

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[35] Article XXVIII unlawfully impairs the free speech interests of a significant portion of the indigenous population served by the State. According to the 1990 U.S. Census, there are 203,527 indigenous natives in Arizona who are age 18 and older, comprising nearly 6% of the State's voting population.

interests of the Navajo people. Such singling out of languages unique to national origin groups in Arizona is unlawfully overbroad, in violation of both the First and Fourteenth Amendments of the United States Constitution.

**Scenario One:** Arizona State office located in the Navajo Nation, where State employee who is a Navajo speaker cannot explain state benefits in the Navajo language to elderly Navajos in need of state services.

**Scenario Two:** In an Arizona public school located in the Navajo Nation, a history teacher who is a Navajo speaker cannot explain Navajo history to Navajo students in the Navajo language.

**Scenario Three:** An Arizona public school teacher or administrator who is a Navajo speaker cannot speak in Navajo to parents or grandparents of a Navajo student with troubled behavior.

**Scenario Four:** An elected state official who is Navajo with a majority Navajo constituency cannot speak in Navajo to his own constituents.

**Scenario Five:** The Navajo Nation cannot use the Navajo language when explaining to members of the Navajo Nation the state (and federal) benefits available as a result of a contract to provide services.

In each of these scenarios the State message is inevitably bound to be "garbled and distorted," the exact opposite result claimed by Petitioners. Efficiency, effectiveness, accuracy and the preservation of unity are sacrificed, ultimately resulting in the destruction of diversity and the mediocritization of America.



Historically, the Navajo language is an oral language, with the first Navajo orthography developed in the late 1880s.[36] Because many Navajos do not read or write the Navajo language, the Navajo Nation is not seeking the written publication of State documents in Navajo. It is the overbroad (absolute) denial of oral Navajo discussions by elected officials and employees of State services and the ability to use the Navajo language as a medium of instruction in public schools throughout the Navajo Nation as well as in neighboring communities which inflict irreparable harm.

The Navajo Nation is unquestionably harmed by Article XXVIII's suppression of the right of employees of the State to utilize languages other than English in providing services to its citizens. And when denial of such speech takes place on lands reserved by treaties which protect tribal self-determination, federal policies are also implicated.

## II. ARTICLE XXVIII VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY UNLAWFULLY DISCRIMINATING AGAINST THE NAVAJO NATION, OTHER AMERICAN INDIAN NATIONS AND OTHER NATIONAL ORIGIN GROUPS

Article XXVIII violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides that "(n)o state shall . . . deny to any

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[36] Louise Lockard, "New Paper Words: Historical Images of Navajo Language Literacy," 19(1) Am. Indian Q. 17, at 21 (Winter 1995).

person within its jurisdiction the equal protection of the laws." That command is violated when a state's constitution renders some persons ineligible for "the . . . protection of the laws" from an entire category of harm. Here, the State's constitution absolutely precludes the usage of indigenous languages in "all government functions and actions." The harm is the impending loss, not only of indigenous languages, but the culture, custom and traditions which form the foundations of American Indian tribal governments and which depend upon the languages for their very definition. Arizona has set apart American Indian tribes and other national origin groups by declaring that **only English** may be used by employees of the State when conducting State business.

### A. Protection of culture

Article XXVIII forbids Navajo teachers in the 33 public schools (with a majority of Navajo students) located on the Navajo Reservation or in public schools in nearby communities from speaking to Navajo students, and their families, in the Navajo language, **except** (1) when teaching Navajo as a "foreign" language or (2) as a tool for teaching English. As noted above, two-thirds of all Navajo students are in these public schools.[37]

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[37] The Johnson-O'Malley Act of 1934, 25 U.S.C. §§ 452-454, authorized the federal government to contract with states for, the education of American Indians, *inter alia*. Since Article XXVIII doesn't interfere with federal programs, American Indian students attending public schools may receive more training in native culture and language because tribal governments require this type of teaching.



In 1990, Congress found that, "there is convincing evidence that student achievement and performance, community and school pride, and educational opportunity is clearly and directly tied to respect for, and support of, the first language of the child or student[,]" and declared it the policy of the United States to, "encourage and support the use of Native American languages as a **medium** of instruction."[38] (Emphasis added.) Article XXVIII clearly violates this federal policy and unlawfully discriminates against the Fourteenth Amendment rights of the Navajo people.

Article XXVIII denies the Navajo Nation the right to implement its own educational law and policy to preserve and protect Navajo culture by utilizing the Navajo language in all schools located within the Navajo Nation's jurisdiction. Implementation of Tribal law and policy is particularly important because of an erosion of Navajo language skills in the younger generations.[39]

### B. Provision of services

Article XXVIII forbids Navajo employees of the State from speaking to Navajo people in the Navajo language. In State offices located throughout the Navajo Nation and in nearby communities, the result is either the ineffective provision of services, or a denial of services altogether to monolingual members of the Navajo Nation, and those

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[38] 25 U.S.C. § 2901(6), § 2903(3).

[39] James Crawford, "Endangered Native American Languages: What Needs to Be Done, and Why?" 19 Bilingual Research J. 17-38 (Winter 1995).

with limited proficiency in English. Those most likely to be harmed are often the ones most likely to be in need of State services: Navajo elders.

Article XXVIII forbids the Navajo Nation, when acting as an agent of the State for the provision of federal or state services, from using the Navajo language in communications with its own citizens. Tribal governments are singled out as the only governmental entities in Arizona denied the use of their own indigenous languages in providing these services.

One of the most insidious effects which the Article XXVIII may have in Arizona is the impact on services provided by tribal governments through contracts with the State of Arizona. There are Arizona programs, funded by state and federal funds, which tribes contract to provide to their members. The Navajo Nation has several such contracts with Arizona, particularly in the health and human services areas.[40]

The main reason for tribal governments to contract with the State to offer this assistance is to provide more effective, culturally relevant services. The key to providing these services more effectively is through the use of the native language. As has been stated, many Navajos, particularly the elderly, are not fluent in English; their primary communications are in Navajo. To effectively receive any assistance offered by the State, the services,

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[40] Such programs include: Title III of the Older Americans Act, 42 U.S.C. § 3021, *et seq.*: Title XIX of the Social Security Act (long-term care, serious mental illness, and developmentally disabled services); and Jobs Training Partnership Act programs, 29 U.S.C. § 1501, *et seq.*, for employment and training.



including a determination of eligibility,[41] must be explained and delivered in Navajo. The elimination of Navajo as a language through which services may be delivered, eliminates any opportunity for these persons to receive the same State services accessible to those speaking English, in contravention of the Fourteenth Amendment to the United States Constitution.

Not only are individuals speaking primarily Navajo further disenfranchised, but governments, like the Navajo Nation are put at risk because of the attempt to make State-provided services more culturally relevant, and thereby more effective. For the programs which the Navajo Nation contracts with the State, the Nation takes on the responsibility to deliver these services. While each of these contracts specifies that the Navajo Nation is an independent contractor, the State remains ultimately liable under equal protection theories for this assistance.

So it is likely that if this constitutional provision is upheld that the Navajo Nation may be required to deliver services in English through either agency theories or simply because certain elements of the State government

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[41] In fact, the Navajo Nation has contracted to fund counties to hire Navajo speakers to assist in determining eligibility for Arizona programs, particularly those offered by AHCCCS (the State medicaid program) since under Arizona law, counties may make this determination. Although the constitutional provisions challenged exclude both the protection of public health and compliance with federal laws, it is not at all clear that these exclusions would apply, since State funds match the federal dollars to be expended and, in any event, eligibility determinations do not directly or necessarily impact on the receipt of medical services.

may feel constrained to force, as a contract term, the use of English. This will eliminate any effective service delivery to the Navajo people, resulting in unlawful discrimination on the basis of national origin in violation of the Fourteenth Amendment.

## III. ARTICLE XXVIII IS PREEMPTED BY FEDERAL LAW BECAUSE IT CONFLICTS WITH THE NAVAJO PEOPLE'S RIGHT TO SELF-GOVERNMENT, PROTECTED UNDER THE NAVAJO TREATIES AND APPLICABLE FEDERAL LEGISLATION AND POLICY.

The Proclamation of 1763 by King George III of England was the precursor of historic preference for the exercise of federal authority in the field of Indian affairs. 25 U.S.C. § 177. Early Supreme Court cases consistently held that state jurisdiction was lacking where Indian interests were implicated.[42]

Recent history reflects a continuation of federal preemption policy in Indian country where tribal sovereignty is threatened by state incursions.[43] As th Court

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[42] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866).

[43] "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olsen*, 324 U.S. 786, 789 (1945)). "[B]road preemption of state laws in Indian country has been consistently recognized as a necessary implication from the federal policy protecting tribal sovereignty." F. Cohen at 273.



often has explained, congressional legislative authority under the Indian Commerce Clause, "and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers" to the exercise of state jurisdiction within Indian country. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

> First, the exercise of such authority may be preempted by federal law. . . . Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them."

*Ibid.* (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959) (citations omitted)).

> Federal treaties and statutes have been consistently construed to reserve the right of self-government to the tribes, and the Supreme Court has held that this 'tradition of sovereignty' is the 'backdrop against which the applicable treaties and federal statutes must be read.'

Cohen at 273 (citing to *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 172-73 (1973)). Thus, reading the 1868 Navajo Treaty in accordance with applicable canons of treaty construction, "together with the tradition of Indian independence[,]" this Court has held that

> it cannot be doubted that the reservation of certain lands for the exclusive use of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision.

*McClanahan*, 411 U.S. at 174-175.

In this case, it is the very heart of tribal sovereignty which is at risk. Article XXVIII threatens the survival of American Indian nations by crippling tribal capability to speak their indigenous languages and to preserve, and protect their use. This is particularly onerous in the field of American Indian education, where federal regulation is both "comprehensive and pervasive,"[44] and thus clearly preempts State power.

American Indians are keenly aware of the necessity of linguistic self-determination as an integral aspect of survival. In 1990, when the Native American Languages Act was enacted, Congress found that, "**languages are the means of communication for the full range of human experiences and are critical to the survival of cultural and political integrity of any people**[.]"[45] (Emphasis added.) The Navajo Nation's right to self-government is impermissibly impaired by Article XXVIII, a right which is protected under the Navajo treaties with the United States and applicable federal legislation and policy. Thus, Arizona's authority to forbid the use of the Navajo language is preempted by federal law.

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[44] See *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 839 (1982), finding subject matter preemption in the field of education.

[45] 25 U.S.C. § 2901(9).



## CONCLUSION

For the foregoing reasons, the Navajo Nation urges this Court to affirm the judgment below.

Respectfully submitted,

THE NAVAJO NATION

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In The

# Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH
AND ROBERT D. PARK,

*Petitioners,*

v.

STATE OF ARIZONA; MARIA-KELLY F. YNIGUEZ;
JAMES P. GUTIERREZ; and ARIZONANS AGAINST
CONSTITUTIONAL TAMPERING,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE OF HAWAII CIVIL RIGHTS COMMISSION, NATIVE HAWAIIAN LEGAL CORPORATION, NA LOIO NO NA KANAKA AND NATIVE HAWAIIAN ADVISORY COUNCIL IN SUPPORT OF AFFIRMING THE JUDGMENT

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## MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF AFFIRMING THE JUDGMENT BELOW

Pursuant to Supreme Court Rule 37, the Hawai'i Civil Rights Commission, the Native Hawaiian Legal Corporation, Nā Loio No Nā Kānaka, and the Native Hawaiian Advisory Council (hereinafter collectively referred to as "Amici"), by and through their undersigned attorneys, respectfully move this Court for leave to file a brief *amici curiae* in support of affirming the judgment below. In support of its motion, Amici state as follows:

1. Amici seek to support the arguments made in Respondents' brief. Each of the Amici has special expertise in the treatment of Hawaiian and other indigenous languages, as well as immigrant community languages, as shown in the Interest of Amici Curiae, attached to their Brief of Amici Curiae. Amici can provide information about Hawai'i's historical experience with language policy, which will assist this Court in the consideration and disposition of the issues raised in this case.

2. Pursuant to Rule 37.3, written consent to file this Amici Curiae has been obtained from Petitioners and Respondent Maria-Kelly Yniguez. Amici have not received written consent from all of the Respondents but believe that they will not object to the filing of this Amici.

Wherefore, it is respectfully requested that this Court issue an order granting Amici leave to file the attached Brief of *Amici Curiae* in support of Respondents.

Respectfully submitted,

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## INTEREST OF AMICI CURIAE

The Hawai'i Civil Rights Commission is a state agency with jurisdiction to enforce Hawai'i's discrimination laws in employment, housing, and public accommodations.[1] Haw. Rev. Stat. § 368-3 (1993). Hawai'i's Constitution expressly prohibits discrimination in the exercise of a person's civil rights because of race and ancestry (national origin). Haw. Const., art. I, § 5 (1978). Race and ancestry (national origin) are protected bases in the three laws enforced by the Commission.

As provided in the Commission's rules, all employers are prohibited from imposing English only rules *at all times* in the workplace, from inquiring about a job applicant's primary language, and from discriminating based upon an individual's accent or dialect. Haw. Admin. R. ("H.A.R.") §§ 12-46-174 and 177 (1991). The Commission considers limitations against the use of any language other than English in the public or private work setting to constitute employment discrimination on the basis of ancestry (national origin), unless justified by a business necessity. H.A.R. § 12-46-174 (1991). For this reason, the Commission seeks to participate as an Amicus Curiae in the instant case.

The Native Hawaiian Legal Corporation (NHLC) is a non-profit, public interest law firm incorporated in 1974

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[1] The Commission is authorized to accept the investigate complaints of discrimination, determine if there is reasonable cause to believe that discrimination occurred, and adjudicate cases where reasonable cause is found. Haw. Rev. Stat. § 368-3 (1993). The Commission can award compensatory and punitive damages and other relief if it determines that the law has been violated. Haw. Rev. Stat. § 368-17(a) (1993).

to assert, protect and defend Hawaiian land, water and traditional/customary rights. NHLC has represented native Hawaiians in quiet title and partition cases, access, gathering and water, and protecting two federally-mandated land trusts for the betterment of native Hawaiians, the Hawaiian Home Lands Trust, and the Ceded Lands Trust. NHLC's interest in filing as amicus curiae in this case is to ensure that the free use and exercise of Hawaiian, the State's only indigenous native language, is not constitutionally abridged nor impaired by any ruling issued by this Court.

Nā Loio No Nā Kānaka (Hawaiian for "the lawyers for the people") is a non-profit, public interest law firm founded in 1983 to provide legal services to indigent immigrants in deportation, exclusion, amnesty and political asylum cases. Nā Loio attorneys also litigate select civil rights cases, several of which have involved language and national origin discrimination issues. Nā Loio's interest in filing as amicus curiae in this case is to ensure that access to state services for non-English and limited-English speakers in Hawai'i will not be impaired.

The Native Hawaiian Advisory Council (NHAC) is a non-profit organization committed to legislative, administrative and judicial advocacy of Native Hawaiian rights. In particular, NHAC focuses on the development and protection of Native Hawaiian cultural rights, with an emphasis on water, gathering and language rights. NHAC receives funding from the Adminstration for Native Americans and a variety of foundations and other private sources.

Amici seek to support the arguments made in Respondents' brief. Each of the Amici has an interest in



the treatment of Hawaiian and other indigenous languages, as well as immigrant community languages. Amici can provide information about Hawai'i's historical experience with language policy, which will assist this Court in the consideration and disposition of the issues raised in this case. Pursuant to Supreme Court Rule 37.3, written consent to file this Amici Curiae has been obtained from Petitioners and Respondent Yniguez. Amici have not received written consent from the other Respondents but believe that they will not object to the filing of this Brief of Amici.

## SUMMARY OF ARGUMENT

Contrary to petitioner's assertions, the controversy over Article 28, Arizona's English Only amendment, is not about national unity versus balkanization. Nor is it about the encouragement of immigrant assimilation versus cultural group separatism. These descriptions conceal the ill-will of many English Only supporters toward immigrant-racial minorities and further mislead persons of good will about the amendment's consequences.

Arizona's English Only amendment is about negation and exclusion. It is designed to achieve a false sense of unity through an apparently homogeneous polity by rendering invisible those who do not look and talk like "Americans." If enforced, the amendment would destroy many immigrant group members' ability to function in day-to-day interactions with government and to participate meaningfully in political life. Moreover, the amendment will, for many, eviscerate their cultural groups and

deprive immigrants of the cultural base of identity and support needed to cope with continuing mainstream racism and nativism. Maintenance of this transitional base is necessary for such groups to survive in and adapt to American society.

The foregoing claims are more than mere contentions. They are supported by relevant history – e.g., by the racist underpinnings and horrendous cultural consequences resulting from the overthrow of Hawai'i's constitutional monarchy and the Hawai'i territorial government's efforts to extirpate the indigenous Hawaiian language to establish English as the "standard" language for multiracial, multilingual Hawai'i. Amici will undertake a historical-legal analysis to provide a framework for understanding Arizona's English Only amendment and the movement that gives rise to it. This analysis will proceed in three parts. First, Amici will show that English Only in Hawai'i meant more than the suppression of Hawaiian and other non-English languages. Although cast in terms of assimilation and societal unity, the Hawaiian language prohibition was part of a larger racist strategy to negate nonwhite racial and cultural groups – i.e., to form a "unified" polity by negating those deemed unfit to be a part of it. Second, Amici will show that banning the Hawaiian language did not result in the assimilation of Hawaiians but nearly destroyed their culture, as well as their physical and spiritual health while effectively excluding them from the United States polity. This cultural destruction contributed to the socio-economic subordination of Hawaiians. It also bred anger, resentment and political resistance. That resistance over nearly a century fueled a resurgence of the Hawaiian language. Finally, Amici will offer a general account of



how the resurgence of the Hawaiian language particularly and multilingualism generally are beneficial to a multicultural democracy.

In short, Amici suggest that, contrary to petitioners' assertions, the proper description of this English Only controversy is negation/exclusion versus multicultural democracy.

## ARGUMENT[2]

### I. PETITIONER HAS IMPROPERLY CHARACTERIZED THE ARTICLE 28 ENGLISH ONLY CONTROVERSY AS UNITY VERSUS BALKANIZATION; RATHER, THE PROPER DESCRIPTION IS CULTURAL/RACIAL NEGATION VERSUS MULTICULTURAL DEMOCRACY.

The stakes in the English Only controversy extend far beyond language choice. They extend beyond access to government services for immigrant groups. They extend beyond simple personal prejudice against nonwhite immigrants. Arizona's English Only amendment is about cultural/racial negation[3] – fostering a false societal unity

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[2] Amici gratefully acknowledge the research work of Michael L. Forman, Ph.D. Chair, Linguistics Department, University of Hawai'i at Mānoa, David Forman, member, Hawai'i Advisory Committee, U.S. Commission on Civil Rights, and law students Jason Shimizu, Susan Serrano, Gay Tanaka and Taryn Tomasa.

[3] Addeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 Notre Dame L. Rev. 1219 (1991). According to Addis, the dominant majority views its own experience and cultural understandings a the societal norm. *Id.*

premised on the disparagement and exclusion of those perceived as unfit to participate in the polity.[4] Notwithstanding contrary suggestions by some of the amendment's

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at 1223. Any group that does not conform that "universal individual" becomes "Other." *Id*. Societies react to the presence of minorities or "Others" within their borders in one of three ways, assimilation, paternalistic pluralism, or negation.

According to the concept of assimilation, the majority sees minorities and their cultures as poor imitations or extensions of the majority culture. *Id*. at 1224. Minorities are required to learn the language of the majority and to follow its cultural and social practices. *Id*. at 1223. Paternalistic pluralism seeks to "protect" minority cultures, but retains that sense of "Other." *Id*. at 1224. Such paternalism is a kind of negation because it assumes that the "Other" is not capable of constructive dialogue and has nothing to contribute to the majority.

Negation exists when the dominant majority sees minority cultures as the negative of itself. *Id*. at 1223. This "Other" has no humanity and is undeserving of participation in the polity. *Id*. at 1224. According to Addis, when negation is the social policy, the dominant majority's options are to totally annihilate the "Other," or to remove it from the environment, such as excluding a group from the political unit. *Id*. at 1223. In addition, negation can also include action taken against a minority group that has the effect of destroying its culture. Eliminating the culture of a minority is to destroy the framework within which a range of choices of group members can be considered and evaluated. *Id*. at 1249, 1262. Language is inseparable from culture for it is language that gives structure and meaning to cultural activities. *Id*. at 1270. "In this sense, to destroy the language of a group is to destroy its culture." *Id*.

[4] For example, memoranda by John Tanton, co-founder and chairman of U.S. English and principal proponent of the English Only movement, reveal the racialized motivation to negate and exclude racial/cultural groups from the polity.

> "The demographic picture in South Africa now is startling similar to what we'll see in California in 2030 . . . A non-white majority has poor education, jobs and income, owns little property, is on its way to political power and speaks a different language."

Andy Hall, *'English' Advocate Assailed*, The Arizona Republic (Oct. 9, 1988) quoting a memorandum from John Tanton, Chairman of U.S. English (1986).

> "Will the present majority peaceably hand over its political power to a group that is simply more fertile? . . . How will we make a transition from a dominant non-Hispanic society with a Spanish influence to a dominant Spanish society with a non-hispanic influence?"

James Crawford, *Hold Your Tongue: Bilingualism and Politics of English Only* 151 (Addison-Wesley Publishing Co., 1992), quoting, John Tanton, "Memorandum to WITAN IV."



proponents, the lessons of history indicate that the English Only amendment will not foster unity but will instead exclude these groups and engender strong, enduring resistance.

Arizona's English Only amendment and others like it[5] replicate a historical pattern of negation and racial/cultural aggression by dominant powers in their attempt to shape and control the social polity. Article 28 is part

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[5] As set forth in the Ninth Circuit's opinion, seventeen other states have adopted "official-English" provisions: Alabama, Arkansas, California, Colorado, Florida, Georgia, Hawai'i, Illinois, Indiana, Kentucky, Mississippi, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, and Virginia. *Yniguez v. Arizonans For Official English*, 69 F.3d 920, 927 n.11 (9th Cir. 1995).

As the Ninth Cir. recognized, *Yniguez* does not apply directly to Hawai'i's language situation. English is a co-official language with Hawaiian. *See*, Section III B, *infra*.

of a pattern of racial and cultural aggression, which is revealed by comparing it to past English Only laws in Hawai'i and by analyzing its provisions and effects within a framework developed by Albert Memmi, a scholar and resister against French colonialism. Memmi identified four related strategies by which dominant, European-derived cultures historically upheld and legitimated their harsh exercises of power over nonwhite racial and cultural groups.[6] Those strategies, which collectively define racist/cultural aggression, are:

1) Stressing the *real or imaginary differences* between the racist and its victim.

2) *Assigning values* to those differences, to the advantage of the racist and the detriment of its victim.

3) Trying to *make them absolutes by generalizing* from them and claiming that they are final.

4) *Justifying* any present or possible *aggression or privilege.*[7]

Memmi's framework focuses on the dominant group's identification of a specific aspect or trait of culture (e.g. language) as a source of social difference. That difference is then given value, with the dominant group's social trait

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[6] Albert Memmi, Attempt at a Definition, in *Dominated Man: Notes Toward a Portrait* 186 (1968) (hereinafter "Definition"); *See also,* Albert Memmi, *The Colonizer and the Colonized* (1965).

[7] Memmi, Definition, *supra* note 6 at 186. *See also* Robert A. Williams, Jr., *Documents of Barbarism: the contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law,* 31 Ariz. L. Rev. 237, 262 (1989) (describing and applying Memmi's framework to Native American law).



valued highly and the subordinated group's trait denigrated. The positive and negative value of differences concerning the one trait are then generalized to differences between dominant and subordinate groups. This differentiation and denigration of the subordinated group then legitimates discriminatory and destructive actions taken against the group. Memmi summarized the collective operation of the four strategies in the following fashion: "Racism is the generalized and final assigning of values to real or imaginary differences, to the accuser's benefit and at his victim's expense, in order to justify the former's own privileges or aggression."[8] In the instant case, the "privilege" is control of the polity and all the benefits resulting from such control. The key strategy for maintaining this privilege is control over language, which provides access to the polity.

Scholar Antonio de Nebrija presented the Gramática (the first written grammar of a modern European language) to Queen Isabella of Spain in 1492. When the Queen asked about its purpose, the Bishop of Avila replied on behalf of Nebrija, (who had written in his introduction) "siempre la lingua ha sido compañera del imperio"), "[y]our majesty, language is the perfect instrument of empire."[9] Amicus Human Rights Watch aptly

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[8] Memmi, Definition, *supra* note 6, at 185.

[9] J. B. Trend, *The Civilization of Spain* 88 (1944), *quoted in* Lewis Hanke, *Aristotle and the American Indians: A Study in Race Prejudice in the Modern World* 8 and n. 31 (1959). The racist pattern of denigration described by Memmi can also be detected in the history of the sixteenth century. "[A]s 'civilized' persons have done around the world, . . . [Spaniards] unhesitatingly condemned the unfamiliar culture pattern and proceeded to break it down." Hanke, at 51-52 (citing Carl O. Sauer,

describes the numerous efforts of dominant groups around the world to destroy nondominant language use as a means of controlling politics and the economy of a country or region.[10]

Amici assert that the national English Only movement, of which Arizona's Article 28 is an integral part, reflects an effort to deploy the concept of "unity" to control who participates in the politics and economy of

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*Agricultural Origins and Dispersals* 42-43 (1952)). Hanke's essay examines the bitter dispute between Bartolomé de las Casas and Juan Ginés de Sepúlveda at the royal capitol of Valladolid in 1550 concerning the question whether the Spanish conquest of American Indians was morally justifiable. Sepúlveda argued in the affirmative, relying primarily upon the Aristotelian concept of natural slavery. De las Casas vehemently defended the Indians' rights. The ecclesiastical judges failed to reach a collective decision and "[t]he facts now available do not support conclusively the victory of either contestant." *Id.* at 74.

"Although the English generally disassociated themselves from Spanish brutality, they obtained their first insights into the native societies from Spanish sources." Bernard Sheehan, *Savagism & Civility; Indians and Englishmen in Colonial Virginia* 6 (1980). "[G]roups such as the Puritans never truly questioned the basic character of European/Indian relations. In the European invasion of North America, native peoples became defined as fundamentally alien, unworthy of any genuine effort to either appreciate their culture or incorporate it at the most peripheral edge of Western society." Bill M. Donovan, *Introduction to Bartolomé de las Casas, The Devastation of the Indies, A Brief Account* 23 (Herma Briffault trans., 3rd ed. 1992).

[10] *See* Amicus Brief for Human Rights Watch at 5, *Arizonans for Official English v. State of Arizona*, Dkt. No. 95-974 ("Rather than reflecting a constructive attempt to build national unity, laws restricting the use of minority languages usually represent one facet of a larger effort to marginalize, persecute or forcefully assimilate disfavored ethnic and cultural minorities").



our country. This brief makes this point through historical-legal discussion, employing Memmi's strategies of racism and describing the United States government's support of white oligarchical control over the politics, economy and social life of Hawai'i, in part, through the destruction of indigenous language and culture. The brief also describes how dominant efforts at racial/cultural group negation, far from achieving even a limited "unity," bred strong opposition and resistance and how evidence of the resurgence of Hawaiian language is highly salutary. As will be discussed in Section IV, *infra*, the most appropriate characterization of the English Only controversy is "negation/exclusion" versus multicultural democracy.

## II. FALSELY CAST IN TERMS OF ASSIMILATION AND SOCIETAL UNITY, EARLY EXCLUSIONARY LANGUAGE POLICY IN HAWAI'I REFLECTED DIFFERENTIATION AND DENIGRATION OF HAWAIIAN CULTURE AS A MEANS FOR EXCLUDING HAWAIIANS FROM THE POLITY

### A. Post-Western Contact Through the Overthrow of the Hawaiian Constitutional Monarchy (1776-1893): Cultural Disfavor

Negative attitudes towards the use of Hawaiian language began as early as 1820, when Calvinist missionaries from New England introduced the Latin alphabet to the Hawaiian people. Missionaries chose to separate themselves from the Hawaiian language and culture.[11]

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[11] "The early missionaries to [Hawai'i] wondered whether the natives there were men or 'a link in creation connecting men

Stressing the differences between their cultures, the missionaries refused to allow their children to learn Hawaiian, maintained their own schools and even punished members for marrying into Hawaiian families.[12]

Missionaries also encouraged the demise of Hawaiian language after leaving the church to work for the Hawaiian government.[13] Richard Armstrong, a former missionary who later served as Minister of Public Instruction for the Kingdom of Hawai'i, strongly advocated an "English-mainly" strategy (later to become English Only).[14] Advocacy by Armstrong and his successors in the Department of Education resulted in the loss of public financial support for Hawaiian schools. Appropriations to English schools, as well as teacher salaries were considerably higher than for their Hawaiian counterparts.[15] The President of the Board of Education sought to justify the privileged treatment of English in his 1884 report to the Hawaiian legislature: "Why worry over the quality of teachers in Hawaiian? We shan't need them much longer, anyway."[16]

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with brutes'." Hanke, *supra* note 9, at 101 (citing E. B. Reuter, ed., *Race and Culture of the South Seas* 171 (1935)).

[12] Larry K. Kimura and William Wilson, Native Hawaiian Study Commission Minority Report, Vol. I: 173-203, 192, U.S. Department of the Interior, Washington D.C. (1983)

[13] *Id.* at 192.

[14] *Id.* at 193.

[15] Kimura and Wilson, *supra*, note 12 at 194.

[16] *Report of the President of the Board of Education to the Hawaiian Legislature* 11 (1884).



English Only advocates also justified their fiscal neglect of Hawaiian schools by citing its deficiencies: "Very little had been attempted before 1870 toward curriculum reconstruction. Retarding influences lay in the use of the Hawaiian language with its lack of extensive literature, in the inadequate facilities for the training of teachers, and in the almost universal faith in the three R's."[17] This statement, of course, ignores the reality that declining public funding, rather than inherent educational inferiority, contributed to declining quality.

### B. Between the Overthrow and Statehood (1893-1959): Cultural Negation

After the overthrow of the Hawaiian constitutional monarchy in 1893, and while the United States debated annexation of Hawai'i, Americans in Hawai'i acted directly to suppress the Hawaiian language. In 1896, the newly created Republic of Hawai'i enacted a law which rendered illegal the use of Hawaiian in public and private schools. The law provided that "[t]he English language shall be the medium and basis of instruction in all public and private schools. . . . Any schools that shall not conform to the provisions of this section shall not be recognized by the department."[18]

By law, Hawaiian was strictly forbidden anywhere within school yards or buildings; the physical punishment

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[17] Benjamin O. Wist, *A Century of Public Education in Hawaii* 135 (1940).

[18] Rev. L. Haw. §211, at 156 (1905).

for violating this prohibition was harsh.[19] Native speaking teachers were threatened with dismissal; some were sent to Hawaiian-speaking homes to reprimand parents for speaking Hawaiian to their children.[20] The Territorial Department of Education and the Territorial Governor, appointed by the United States President, approved these actions.

What drove the coordinated legal and bureaucratic push to eliminate the Hawaiian language from school, public places and homes? Some offered an explanation of assimilation – to bring Hawaiians into the American fold. Other explanations, however, are more resonant – given the impending annexation by the United States, the small yet dominant white American population in Hawaíi and the struggle for control over 1.7 million acres of militarily and agriculturally valuable Hawaiian land.

The debates concerning the United States annexation of Hawai'i at the time of the banning of Hawaiian language reveal a racial/cultural explanation consistent with the sociology observation that "to destroy the language of a group is to destroy its culture."[21] Those debates illustrate the intensity of racial and cultural aggression and the desire of Americans in Hawai'i and the United States to negate Hawaiians as a racial/cultural group. Congressional debates characterized Hawaiians as uncivilized, loathsome heathens. Congressman Clark of Missouri suggested that annexation of Hawai'i would mean that the Speaker of the House might one day have to recognize

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[19] Kimura and Wilson, *supra* note 12, at 196.

[20] *Id.* at 196.

[21] Addis, *supra* note 3, at 1270.



" 'the gentleman from the Cannibal Islands,' who will gaze upon you with watering mouth and gleaming teeth."[22] Clark added, "How can we endure our shame when a Chinese Senator from Hawai'i with his pigtails . . . his pagan joss in hand, shall rise from his chair in pigeon [sic] English [and] proceed[ ] to chop logic with . . . Henry Cabot Lodge?"[23] Other congressional depictions of Hawaiians starkly illustrate the strategies of racist aggression identified by Memmi.

> Side by side on their islands were two civilizations, higher and a lower civilization. On the side of the higher civilizations were ranged the intelligence, the progress, the thrift, the aspirations for enlarged liberty and for the legalization of a great destiny for Hawai'i. On the other side was ranged the monarchy, with its narrow, contracted view of human rights, with its semibarbarous face turned toward the past, unwilling to greet the dawning sun . . . From the very nature of things these two civilizations could not exist together forever. One was to survive and the other would have to perish.[24]

These depictions, using Memmi's analysis, first identified differences between Americans and Hawaiians, then assigned values to those differences (higher civilization, intelligence, progress, thrift, liberty; lower civilization, narrow view of rights, semibarbarous face) and finally generalized from them in order to justify the United States'

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[22] Osmos Lanier, Jr., "Anti-Annexationists of the 1890's" 57 (Ph.D. thesis, University of Georgia) (microfilmed by University Microfilms International, Ann Arbor, Michigan, 1966).

[23] *Id.*

[24] 53 Cong. Rec. 1885 (1894).

aggression over the former Hawaiian nation (survival of Americans and demise of Hawaiians) and its privilege (control over valuable military and agricultural lands).

Popular discourse of the time also treated Hawaiians as unworthy of participation in the American polity. American commentators thus cast Pacific islanders as inferior to Anglo-Saxons and referred to them generically as "dark-skinned 'mongrel[s]' . . . not suitable for American citizenship."[25] While some asserted Hawaiians' physical inferiorities, others implied that there were inherent limitations of the ability of Hawaiian citizens to govern themselves. Some considered the Hawaiian population to be a "hot bed of corruption"[26] threatening to further complicate America's racial problems. American press referred to Queen Lili'uokalani as "a disreputable hag who is the head voodoo priestess of Hawai'i[27]

Annexation thus posed a dilemma for the United States. It meant enhanced American political, military and economic interests. But it also potentially meant inclusion of "inferior, semi-barbarious, corrupt, threatening" Hawaiians in the American polity. The solution: annexation with an implicit promise of the "demise" of Hawaiians as a racial/cultural group. One important instrument of demise: language – "to destroy the language of a group is to destroy its culture." In

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[25] Thomas J. Osborne, *Empire Can Wait: American Opposition to Hawaiian Annexation, 1893-1898* 36 (1981).

[26] *Id.*

[27] Lanier, *supra* note 21, at 16. (quoting the Memphis Commercial-Appeal, February 22, 1893 at 4). Lili'uokalani was also referred to as "the tar-baby queen[.]" *Id.* at 31 (quoting the Atlanta Constitution, February 3, 1894, at 1).



the context of these annexation debates, the banning of the Hawaiian language thus reflected one aspect of a larger drive toward the "demise" or negation of Hawaiians as a racial/cultural group.

Similarly, fearing the increasing "sinister" power of the "unassimilable" Japanese in Hawai'i, the white business-government oligarchy targeted elimination of the Japanese language as a means for controlling Japanese culture (folklore, dance, religion, ethics).[28] That effort, and the English Only laws it spawned,[29] failed in the United States Supreme Court.[30]

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[28] Franklin Odo and Kazuko Sinoto, *A Pictorial History of the Japanese in Hawaii: 1885-1924* 127-128 Bishop Museum Press (1985).

[29] *See, e.g.*, 1920 Haw. Sess. L. Act 30 (requiring foreign language school teachers to obtain teaching permits demonstrating knowledge of American language, history and democracy, and mandating that they pledge not to teach anything that contradicted American ideals or institutions); 1923 Haw. Sess. L. Act 171 (prescribing subjects, courses, qualifications for entrants, attendance requirements, and assessed fees on these schools); 1925 Haw. Sess. L. Act 152 (prohibiting foreign language schools from filing petitions against government regulations).

[30] *Farrington v. Tokushige*, 273 U.S. 284, 299 (1927). When efforts to impose English Only failed, the government decided to provide more benefits to English schools. The Department of Public Instruction (hereinafter "DPI") enacted a policy of creating more English Standard Schools and English sections in areas without such schools. *See, e.g.*, 1927 Haw. Sess. L. Act 102 (substituting the phrase "standard schools" for "select schools" in Rev. L. Haw. § 312 (1925); the original legislation, which was enacted in 1896, gave the DPI discretion to establish, maintain and discontinue select schools taught in the English language for Hawaiian royalty). By 1937, there were ten such schools

## III. THE CULTURAL DESTRUCTION ACCOMPANYING HAWAI'I'S ENGLISH ONLY LANGUAGE POLICY CONTRIBUTED TO THE SUBORDINATION OF HAWAIIANS, BRED LONG-TERM POLITICAL RESISTANCE WHICH ULTIMATELY FOSTERED OFFICIAL MULTILINGUALISM.

### A. The Impact of Restrictive Language Policies.

As a direct result of the 1896 law prohibiting the use of Hawaiian in public and private schools and its accompanying government educational policies, the number of schools conducted in Hawaiian dropped from 150 in 1880 to zero in 1902.[31] The aggressive stance taken by English Only advocates left only remanents of the Hawaiian speaking community.[32] The language has a single native-speaking community

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dominated by caucasians. The legislature did not resolve to eliminate these symbols of "Caucasian snobbishness" until 1949. Bernhard Hormann, *Speech, Prejudice, and the School in Hawai'i*, 11 Social Process 74, 79 (1947); 1949 Haw. Sess. L. Act 227. The schools were not completely phased out until 1961. Cecil K. Dotts and Mildred Sikkema, *Challenging the Status Quo: Public Education in Hawai'i 1840-1980* 104 Hawai'i Education Ass'n (1994).

[31] Albert J. Schütz, *The Voices of Eden: A History of Hawaiian Language Studies* 352 (1994).

[32] Because Hawaiian was no longer the medium of instruction in the school system, many children who speak Hawaiian as their native language found fewer opportunities to use Hawaiian outside the home. The average age of native speakers of Hawaiian rose. Newspapers, which were the primary medium for communication in Hawaiian at that time, declined from a total of twelve newspapers (nine secular and three religious) in 1910 to one religious newspaper in 1948. When radio and television replaced the newspaper as the medium of communication, no Hawaiian programs were started. Schütz, *supra* note 29, at 362-363.



of some 150 individuals located on a private island, Ni'ihau.[33] And until recently, when a state-sponsored Hawaiian language immersion program started, there were less than 2,000 fluent native speakers – all of whom are above the age of sixty and are scattered throughout the remaining Hawaiian Islands.[34]

The destruction of Hawaiian culture, including the banning of Hawaiian language, is revealed in statistics concerning current socio-economic status of Hawaiians. In the 1980s, "of the 63,000 Hawaiian adult workforce approximately 10% were unemployed . . . nearly DOUBLE the State level; this ratio of unemployment for Hawaiians has not changed significantly since then."[35] Thirty-five percent of Hawaiian households have inadequate income; 15.1 percent are living below the poverty line (compared to 7.8% of total families in the State).[36] The life span of Hawaiians is nearly seven years less than that of the total population of the State.[37] Over 75 percent of the learning disabled youths in the public schools are Hawaiian (although Hawaiians comprise less than twenty

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[33] Kimura and Wilson, *supra* note 12, at 191.

[34] *Id.*

[35] Alu Like, Inc., *A Native Hawaiian Profile* 1 (1981). Moreover, the majority of the Hawaiian adult workforce was employed in entry level positions while relatively few Hawaiians found themselves in the professional fields. *Id.*

[36] *Id.*

[37] *Id.* Hawaiians had the highest incidence of chronic heart trouble and diabetes in the State. *Id.*

percent of the state population).[38] Finally, sixty-six percent of the youths in correctional institutions are Hawaiian.[39]

### B. Resistance and Reemergence

Similar to the resistance by Hawai'i Japanese to the closure of Japanese language schools, some Hawaiians chose to resist English Only. In the 1930s, native speakers organized a Hawaiian language school and a Hawaiian Language League (similar to the Gaelic League).[40] Others later created the Lalani Hawaiian Village to teach Hawaiian language and culture.[41] The Hawaiian churches resisted English Only services for over a half a century.[42]

Despite this resistance, by the 1960s, at the time of greatest Hawaiian socio-economic suffering, Hawaiian language and culture appeared to be on the brink of complete demise.[43] In the 1970s, however, long simmering Hawaiian anger and frustration, spurred by the black power and other ethnic movements, erupted in three forms. One form was political resistance to land development in the state – to the business-as-usual mindset that

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[38] *Id.*

[39] *Id.*

[40] Kimura & Wilson, *supra* note 12, at 197.

[41] *Id.* at 197. The Ulu Mau Village, a similar effort in the 1960's, also met with an early demise. *Id.*

[42] *Id.* at 196. Nevertheless, by the 1960's, many of the services conducted in Hawaiian were replaced with English because most of the native-speaking Hawaiian ministers had died.

[43] Schütz, *supra* note 29, at 356-361.



desecrated Hawaiian lands and lifestyles. The second was Hawaiian legal claims to governmental reparations and political and cultural self-determination. The third form, supportive of the first two, was a Hawaiian cultural renaissance. Integral to that renaissance was the transformation of resistance against English Only to the birth of official multilingualism.[44]

In 1978, the people of Hawai'i added a new section to the Hawai'i Constitution affirming Hawaiian as a co-official language with English. Hawai'i thereby became an official multilingual state.[45] Another constitutional amendment mandated the state to "promote the study of Hawaiian culture, history and language . . . [and] provide for a Hawaiian education program consisting of language, culture and history in the public schools."[46] The amendment's purpose is:

> to recognize and preserve the Hawaiian culture which has contributed to, and in many ways forms the basis and foundation of, modern Hawaii, *and to revive the Hawaiian language, which*

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[44] *Id.* at 361.

[45] Article XIV, Section 4 of the Hawai'i Constitution provides that "English and Hawaiian shall be the official languages of the state, except that Hawaiian shall be required for official public acts and transactions only as provided by law." The constitutional convention's delegates added this provision because they "[w]anted to overcome certain insults of the past where the speaking of Hawaiian was forbidden in the public school system, and of today[,] where Hawaiian is listed as a foreign language in the language department at the University of Hawaii." Committee of the Whole Rep. No. 12 *reprinted in* 1 *Proceedings of the Constitutional Convention of Hawai'i of 1978*, 1016 (1980).

[46] Haw. Const. art. X, § 4 (1978).

*is essential to the preservation and perpetuation of Hawaiian culture.*[47]

As a result of political resistance, the self-determination movement and the cultural renaissance, Hawai'i has witnessed the rebirth of the Hawaiian language.[48] In 1986, ninety years after Hawaiian was outlawed from public schools of Hawai'i, the State legislature amended the official "English only" law in public schools to implement Hawai'i's official multilingual policy by authorizing the Board of Education to provide for "special projects using the Hawaiian language."[49] In response, in 1987, the Board created Papahana Kaiapuni Hawai'i, or the Hawaiian Language Immersion Program, to help revitalize the language starting with kindergarten youths.[50]

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[47] Stand. Comm. Rep. No. 57, *reprinted in* 1 *Proceedings of the Constitutional Convention of Hawai'i of 1978*, 637 (1980). (emphasis added)

[48] Hawaiian language class enrollment at the University of Hawai'i has risen from a low of twenty-seven students in the 1961-62 school year to more than 1,200 students in 1996. Hawaiian language instructors have increased from one teacher in 1961 to twenty-three in 1993. There is now one Hawaiian language radio program one day a week for one hour, and one newscast in Hawaiian Monday through Friday. 'Ahahui 'Olelo Hawai'i, an organization created to promote the Hawaiian language, was created in the 1970's and is still operating today. Kimura and Wilson, *supra* note 12, at 197.

[49] Haw. Rev. Stat. § 298-2(b) (1993).

[50] This program has two major goals: to help restore and revitalize Hawaiian, which is in danger of being lost as the elder generation of native Hawaiian speakers die, and to develop proficiency in both Hawaiian and English.



## IV. THE SOCIAL VALUE OF MULTILINGUALISM TO A MULTICULTURAL DEMOCRACY

Language is a social phenomenon that is shared in some sense by two or more individuals. Multilingualism is a common condition of humankind; in the world at large, many more people are multilingual than are monolingual.[51] Even where popular belief suggests a homogenous and monolingual nation, for example Japan, ongoing research demonstrates the presence of considerable, but overlooked, multilingualism.[52] The United States is no different.[53]

This nation's founders appreciated and respected the languages of native peoples. Benjamin Franklin, Thomas Jefferson, and George Washington collected Indian grammars.[54] Similarly, William Penn held a profound sense of

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[51] 1 *International Encyclopedia of Linguistics* 183 (William Bright ed. 1992) ("most of the two hundred or so countries of the world use more than one language").

[52] Stanlaw and Inoue, 72 Language 441-42 (1996) (Reviewing John Maher and Kyoko Yashiro, eds. *Multilingual Japan*, (1995)); William A. Smalley, *Linguistic Diversity and National Unity, Language Ecology in Thailand* 1 (1994) ("Thailand is a country with eighty languages. . . . Yet Thailand gives outsiders and even many of its own people the impression of being almost monolingual.").

[53] We now know that different Native American groups experienced multilingualism in a variety of forms. Moreover, the people who came to America from the Old World spoke a variety of languages; some of them undoubtedly spoke more than one language.

[54] Bruce E. Johansen, *Forgotten Founders* 94 (1982). Franklin often affected Indian speech patterns in his writings. *Id.* at 88. Jefferson cited examples of Indian oratory to show that they

respect for the linguistic diversity found in Pennsylvania.[55] The country's founders rejected the idea of one "national" or "official" language, embracing instead the idea that civic discourse must be conducted using any and all languages that the people made part of their social life: the original idea of a multicultural democracy.[56] During the early formation of this multicultural democracy, multiple languages "played critical roles in the political and social life of the nation . . . [and] [c]ultural and ethnic pluralities abounded."[57] Foreign language societies offered cultural and social security to immigrants and churches provided services in different languages. Leaders recognized that "if a national government legally pressure[d] groups to abandon their native languages, the repression of these tongues and

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were not mentally deficient. *Id.* at 96. Within three years of his arrival in America, Thomas Paine was sitting around a council fire with the Iroquois, having learned to speak enough of their language so that he did not require an interpreter. *Id.* at 116.

[55] *See* Nancy F. Conklin and Margaret A. Lourie, *A Host of Tongues: Language Communities in the United States* 194-95 (1983) (referring to the "Pennsylvania Dutch" or *Deutsch* in their own tongue); Suzanne Romaine, *Language in Society: An introduction to sociolinguistics* 48 (1994) (referring to Hasidic Jews); 3 *International Encyclopedia of Linguistics* 358 (William Bright ed. 1992) (mentioning Russian-speaking communities in the United States).

[56] *See generally* Shirley B. Heath, *A National Language Academy? Debate in the New Nation*, 11 Int'l J. Soc. Language 9, 38 (1977) ("Diversification in language choice, change, and use not only prevailed, but was purposefully left unrestrained by the national leaderships' repeated failure to provide a national language academy.").

[57] *Id.* at 12.



separate unities could provoke resistance."[58] Seeing the potential for the use of plural languages to legitimate the new government, these leaders recognized that "linguistic minorities would not become separate and distinct peoples within the nation, so long as no legal force proscribed the use of their languages."[59]

As in the past, multilingualism today develops from the confluence of economic necessity, personal choice, and institutional support.[60] It can be liberating, enriching and socially constructive. Charlene Sato, Ph.D., a Japanese American from Hawai'i, observed "[t]hroughout its history as a marker of ethnic (actually, non-white) identity during the plantation era and of working class identity subsequently, [Hawai'i Creole English or] HCE was heavily stigmatized. . . . Creole speakers have typically been ashamed of their speech, referring to it as 'broken' or 'bad' English, a bad habit that must be overcome in

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[58] *Id.* at 13.

[59] *Id.* at 14 (citations omitted). *See also id.* at 33 (observing that Chief Justice John Marshall refused to have the Court endorse Noah Webster's 1828 dictionary; he reminded Webster that in America, individuals, not public bodies, made such choices).

[60] Over the last fifty years, the federal government has supported the learning of other languages "in the national interest" under a variety of programs beginning with the Army Language School activities of World War II and extending into postwar programs such as the National Defense Education Act of 1958. Pub. L. No. 85-864, 72 Stat. 1581 (1958), and the Foreign Language Assistance Act of 1988, Pub. L. No. 100-418, 102 Stat. 1476 (1988).

order to succeed in life."[61] Accordingly, Sato successfully practiced a "nonstandard approach to standard English."

> The "nonstandard" approach to the teaching of SESD advocated here takes as fundamental (a) the social and linguistic integrity of minority varieties of English, and therefore, (b) the need to design sociolinguistically appropriate pedagogy for speakers of such varieties. Rather than remediation of students' language and replacement of minority varieties with "proper" English, the teaching of SESD may prove more successful if systematically practiced as additive bialectalism.[62]

Rather than pursuing or endorsing English Only policies, the application of Sato's approach would be more consistent with the multicultural democratic principles that this nation was founded upon as well as the reality of multilingualism throughout the world.

## V. RECOGNIZING AND PROMOTING DIVERSITY AND PLURALISM IS AN EMERGING TREND IN INTERNATIONAL LAW, PARTICULARLY WITH RESPECT TO THE PRESERVATION OF LANGUAGE AS A FOUNDATIONAL ELEMENT OF CULTURE.

Several United Nations conventions and declarations, both in place and in prepatory stages, set forth international norms preserving language as a foundational element of

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[61] Charlene J. Sato, *Language Change In a Creole Continuum: Decreolization?*, 10 U. Haw. Working Papers in ESL 127, 137 (1991). *See infra* text accompanying notes 12-24.

[62] Charlene J. Sato, *A nonstandard approach to standard English*, 23 TESOL Quarterly 259, 276-77 (1986).



culture and political and social stability.[63] The Draft Declaration on the Rights of Indigenous Peoples, for example, affirms the right to maintain cultural identity, including the practice and revitalization of group customs and traditions.[64] According to this approach to indigenous rights, language is an integral part of cultural identity.

> Language embodies a series of unconscious but enduring cultural traits symbolized by words. [Language] is not only the expression of a particular community, but also the most important force making for the community's integration . . . In learning a language, a child acquires the basic cultural heritage of his people and his

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[63] U.N. Comm'n on Human Rights, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, adopted in Res. 1992/16, Feb. 21, 1992, *reprinted in* Report of the Working Groups on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, U.N. Doc. E/CN.4/1992/48, preamble and Corr.1, at 16-19 (1992) ("the promotion and protection of the rights of persons belonging to national or ethnic religious and linguistic minorities contribute to the political and social stability of States in which they live" and the strengthening of friendship and cooperation among peoples). *See also* International Convention on the Elimination of all Forms of Racial Discrimination, Oct. 21, 1994, art. 7, 660 U.N.T.S. 195, 212; U.N. Economic & Social Council, Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/Add.1 (hereinafter "Draft Declaration") (recognizing the "diversity and richness of civilizations, which constitute the common heritage of humankind").

[64] Draft Declaration, *supra* note 61, arts. 8 and 12. *See also* International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

> times. Language gives him a particular mental set . . . and a general life style. Each language reflects a particular way of seeing things and the world. . . . It is thus being recognized that these languages are an integral part of the various cultures of the country.[65]

## CONCLUSION

The controversy over Article 28, Arizona's English Only amendment, thus is not about national unity versus balkanization or the encouragement of immigrant assimilation versus cultural group separatism. The amendment is about racial/cultural negation. It is designed to achieve a false sense of unity by rendering invisible those who do not look and talk like "Americans." Contrary to petitioners' assertions, the proper characterization of this English Only controversy is negation/exclusion versus multicultural democracy. Amici urge that this Court reject negation/exclusion and endorse multicultural democracy

[65] Draft Declaration, *supra*, note 61 para. 2, 4-6 & 10.



by affirming the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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